

1 (Recess.)

2 THE COURT: I had a question about a document that  
3 we found on the witness stand. I was having Exhibits 223 and  
4 224 scanned.

5 MR. KARRENBURG: That one was the one that  
6 refreshed Mr. Barnes' recollection of exactly the numbers. So  
7 he didn't memorize them. It wasn't offered. If counsel wants  
8 it in, you're welcome.

9 THE COURT: It's yours. Okay.

10 MR. KARRENBURG: As soon as my witness gets back,  
11 I'm ready to go.

12 THE COURT: Where is your witness?

13 MR. SNEDDON: I think he's out there.

14 MR. KARRENBURG: We're ready, Your Honor.

15 THE COURT: Okay. They're here.

16 (Whereupon, the jury returned to the court  
17 proceedings.)

18 THE COURT: We're convened again in StorageCraft  
19 vs. Kirby. We're ready for the next witness. It might be a  
20 good idea to clean up some of those binders before we do that.

21 MR. KARRENBURG: I'm going to do that, Your Honor.  
22 And I call Mr. Patrick Kilbourne.

23 THE COURT: Mr. Kilbourne, if you'll come up and  
24 just pause here in front of the clerk to take an oath.

25 THE CLERK: Raise your right hand, please.

1 PATRICK KILBOURNE,  
2 called as a witness at the request of Plaintiff,  
3 having been first duly sworn, was examined  
4 and testified as follows:

5 THE WITNESS: Yes.

6 THE CLERK: Thank you. If you'll, please, state  
7 your name and spell it for the record, please.

8 THE WITNESS: Patrick Kilbourne. P-A-T-R-I-C-K.  
9 Kilbourne, K-I-L-B-O-U-R-N-E.

10 THE CLERK: Thank you.

11 DIRECT EXAMINATION

12 BY MR. KARRENBURG:

13 Q. Good afternoon, Mr. Kilbourne.

14 A. Good afternoon.

15 Q. You've been hired by my law firm to be an expert  
16 witness in this case; correct?

17 A. Yes.

18 Q. Okay. Would you, please, describe your educational  
19 background?

20 A. I have a bachelor's degree in accounting from  
21 Brigham Young University. I also have a master's degree in  
22 accounting from Brigham Young University. And I have an MBA  
23 from the Wharton School from the University of Pennsylvania.

24 Q. And the Wharton School is a business school;  
25 correct?

1 A. That's right, yes.

2 Q. And have you taken any continuing education in the  
3 area of intellectual valuations?

4 A. Yes. I have a number of professional  
5 certifications, all of which require anywhere from three to  
6 five days per year of continuing education. So that goes on  
7 every year.

8 Q. Have you ever testified before concerning -- in a  
9 lawsuit concerning intellectual property valuations?

10 A. Yes.

11 Q. Could you tell the jury which ones those were?

12 A. Well, I've been involved with a number of cases  
13 over my career. Some of them go to the trial at this point  
14 where I testify. Some do not where I prepare a report but  
15 they settle or work things out beforehand.

16 And I've been involved in cases dealing with  
17 intellectual property of patents, copyrights, trade secrets.  
18 I've dealt with reasonable royalty issues, with royalty  
19 audits, with accounting investigations, lost profit analyses.  
20 All those areas.

21 Q. And on the cases that you've worked with, what were  
22 some of the clients that hired you?

23 A. Some of the more recognizable clients would be IBM  
24 in which I worked with them in a software case dealing with  
25 source code. I've done several, a couple of cases with

1 Novell, Shell Oil, InVideo, which is a chip maker. Motorola.  
2 Those are maybe a few that would be more recognizable.

3 Q. Thank you. Where do you currently work?

4 A. Berkeley Research Group.

5 Q. How long have you been with Berkeley Research  
6 Group?

7 A. About a year and a half.

8 Q. And where did you work prior to that?

9 A. Law and Economic Consulting Group.

10 Q. How long were you with LECG?

11 A. About nine years.

12 Q. Tell us how it ended up going from LECG to BRG.

13 A. I moved my practice from LECG to BRG. It was just  
14 a transition of taking myself and my staff and moving my  
15 clients from one company to the other.

16 Q. And what's the business of LECG and BRG?

17 A. Both companies provide expert services in  
18 litigation and in litigation support and other areas like  
19 that. We provide independent expert analysis. We have  
20 accountants, economists, statisticians, finance types.

21 Q. And have you received any professional credentials?

22 A. Yes.

23 Q. What would those be?

24 A. I'm a CPA, which is a certified public accountant.  
25 I'm an ABV, which is accredited in business valuation. I'm a

1 CMA, which is certified management accountant; a CFF, which is  
2 certified in financial forensics; and a CFE, which is a  
3 certified fraud examiner.

4 Q. Are you accredited in business valuations?

5 A. Yes, I am.

6 Q. And who accredits you in that?

7 A. That accreditation is from the AICPA, which is the  
8 American Institute of Certified Public Accountants.

9 Q. And you've provided testimony as you've indicated  
10 in other litigation matters; right?

11 A. Yes. Many.

12 Q. And those include intellectual property issues?

13 A. Yes.

14 Q. Royalty issues?

15 A. Yes.

16 Q. Royalty audits?

17 A. Yes.

18 Q. Lost profits?

19 A. Yes.

20 Q. And, of course, forensic accounting?

21 A. Yes.

22 Q. Did any of those cases involve reviewing license  
23 agreements?

24 A. Yes. Many of them.

25 Q. You already gave me some examples of those, I

1 think, so we can move on.

2 Let me move to admit Exhibit 165, Your Honor, which  
3 is just Mr. Kilbourne's CV.

4 MR. ENSOR: No objection, Your Honor.

5 THE COURT: 165 is received.

6 (Whereupon, Plaintiff's Exhibit 165 was received.)

7 MR. KARRENBURG: Thank you, Your Honor.

8 Q. BY MR. KARRENBURG: What was your assignment in  
9 this matter?

10 A. I was asked to determine a reasonable license fee  
11 for the VSnap source code that Mr. Kirby misappropriated from  
12 StorageCraft.

13 Q. Let's make it clear. You are not here to give any  
14 expert opinion on any liability issues; is that correct?

15 A. That's correct. The liability is separate from the  
16 damages, and I am just dealing with the damages.

17 Q. Thank you. What did you do to actually execute  
18 your assignment for me?

19 A. I reviewed a number of documents. Part of my  
20 report is, I think it's a three-page list of documents that I  
21 reviewed that includes license agreements, correspondence  
22 between StorageCraft and other parties. We did independent  
23 research of licenses that are in the public domain. I  
24 reviewed a number of depositions. Other documents. It's  
25 quite an extensive list.

1 Q. And did you speak to any of the StorageCraft  
2 employees?

3 A. Yes, I did. I spoke to a number of StorageCraft  
4 people, both including here in the US and Russia.

5 Q. In fact, in Russia you spoke to Mr. Shatskih;  
6 right?

7 A. That's correct.

8 Q. Let's get this out. You have worked with me and  
9 Ms. Sneddon before in a number of cases; isn't that true?

10 A. Yes, that's correct.

11 Q. Did you do any independent research regarding  
12 software licenses?

13 A. Yes. We looked at a number of licenses that are  
14 publicly available. And we actually used a third-party  
15 research firm called Royalty Source to go and find software  
16 licenses that could be considered comparable to what  
17 StorageCraft would have licensed with the VSnap.

18 Q. And after doing your work, what was the opinion you  
19 reached?

20 A. My opinion is that the reasonable license fee for  
21 the VSnap software or source code would be at least  
22 \$4.5 million.

23 Q. Okay.

24 Can we put up the first of Exhibit 131, which is a  
25 demonstrative exhibit?

1           Could you explain to the jury what is the basis for  
2           your conclusion?

3           A.    Yes.  So in my analysis, I went through five  
4           factors that led me to this conclusion of a \$4.5 million  
5           reasonable license fee.  And those five are listed here on  
6           this page.

7                   Number one is the cost of developing the source  
8           code and bringing the software to market.  Number two is the  
9           comparity of the VMware license, which I'm sure we'll discuss,  
10          but it's a license that is contemporaneous or around the same  
11          time when Mr. Kirby misappropriated the software.  Also STC's  
12          unwillingness to license the source code.  And Number four,  
13          their revenue growth.  And finally a comparison to software  
14          and source code license rates that are in the public.

15          Q.    All right.  Could we begin by going through the  
16          first area.  What did you do concerning the cost of developing  
17          the source code and bringing the software to market?

18          A.    Sure.  This encompasses several things.  And if  
19          you're a company that wants some source code or software, your  
20          first decision is, do you build it or do you buy it?  And if  
21          you're going to buy, that means you're going to license it  
22          from someone else.  If you build it you're going to have to  
23          build it and build the code yourself, and you've got to take  
24          it to market and that takes both time and money.

25                   So one of the ways you look at these types of

1 issues, you say, if a company choses to build it themselves,  
2 what would it take them?

3 So in this issue, we first have the actual cost of  
4 development. And perhaps if we can go to the --

5 Q. Next slide?

6 A. -- next slide, yeah.

7 Q. It's in the same exhibit.

8 A. So there's a couple of components to this, and one  
9 is just the actual time and energy it takes to build it.

10 And Mr. Kirby testified in his deposition that it  
11 took he and three other developers, the three Russian  
12 developers that we've talked about, between 15 and 20 months  
13 to develop the software. So when you take that time, multiply  
14 by 250 an hour, and 250 an hour is the rate that StorageCraft  
15 charges its software developers out to people, to customers  
16 for doing develop work at around that time, if you just do  
17 that math you get to between 2 1/2 to \$3 1/2 million.

18 So that's just the first part of the actual time  
19 that somebody would spend. And it's not so much how much time  
20 or money -- how much money was actually spent, but how much  
21 the next person would have to spend to do it.

22 So what we're looking at here is a new party comes  
23 in and says, I want to build the software. How long will it  
24 take them, and what will I have to pay for that?

25 Q. Now, you sat here both yesterday and today

1 listening to Mr. Kirby's testimony; is that correct?

2 A. Yes.

3 Q. Was there anything in that testimony that made you  
4 question this first line item on here?

5 A. Well, Mr. Kirby's testimony in his deposition and  
6 what he gave today was inconsistent. In his deposition he  
7 testified that it took 15 to 20 months. Today he said that it  
8 was being developed in 2000, 2001, 2002, 2003 and 2004, so  
9 upwards of five years when the development was going on. So I  
10 don't know if those two reconcile by perhaps he's -- in his  
11 deposition he was talking about the total time all squished  
12 together as opposed to being spread out over five years. But  
13 one way or the other, I'm comfortable with what he said.

14 Also as I mentioned I spoke to Max Shatskih, the  
15 Russian engineer, and confirmed that with him. And he  
16 corroborated the fact that they spent about that much time  
17 developing the software.

18 Q. And how did you satisfy yourself that the \$250 an  
19 hour was a reasonable rate?

20 A. Well, again, that's the rate that StorageCraft  
21 charges its clients for software development work. And, you  
22 know, that's a pretty reasonable rate for that kind of work.  
23 You have to remember that that folds in, it's not just --  
24 that's not -- that's not just you grab somebody and say, we're  
25 going to pay you 250 an hour. That what's goes to a company.

1 So if you have a group of people, they have overhead. They  
2 have all the costs that are in there. They're trying to make  
3 a profit, as well. And so that number incorporates cost of  
4 the labor, the profit, overhead, everything.

5 And not only that, but as we've heard the testimony  
6 about the expertise of Mr. Kirby and of Mr. Shatskih that  
7 they're both Microsoft DDK MVPs, that's a very specialized  
8 skill. And so I know that in my discussions with StorageCraft  
9 they discussed one other person who was also a Microsoft  
10 DDK MVP, and he has his own consulting company. He was  
11 billing out at \$500 an hour. So the 250 is a pretty good  
12 number.

13 Q. Now, you heard the testimony yesterday and today  
14 about how much, which was granted a little bit all over the  
15 place, but generally about how much was being paid to the  
16 Russian engineers?

17 A. Yes, I did.

18 Q. Did that make you change your evaluation at any  
19 time?

20 A. No, for two reasons. First of all, again, we're  
21 not looking at what the Russian engineers were paid, but we're  
22 looking at what you have to pay to go out in the marketplace  
23 and do it now. So if they were below market, that's fine.  
24 But also the second thing is that what Mr. Kirby talked about  
25 was their actual salary, their compensation, which was

1 somewhere in the 30- to \$60,000 range. But also those  
2 engineers received 16 percent of StorageCraft. And that  
3 16 percent would be valued at about \$2 million.

4 So whether you look at what they received, which  
5 was, you know, around 2-, \$3 million because that doesn't  
6 include Mr. Kirby, and actually probably more than that  
7 figure. If you took in what Mr. Kirby received it probably  
8 would be well above the \$3.5 million figure. So not only did  
9 they receive around this level of compensation, but it is also  
10 consistent if you went out and have to pay if you went and did  
11 it yourself with a new consulting company.

12 Q. And that 16 percent of the \$12 million, that was  
13 based on the value that was put on the company by everybody  
14 including Mr. and Mrs. Kirby in 2004; is that correct?

15 A. Everybody agreed to that valuation. And not only  
16 did they agree, but importantly to people like me, NetJapan  
17 put their money where their mouth was. They bought  
18 10 percent, and they paid \$1.2 million. So that says the  
19 market has valued this at \$12 million. So when you take the  
20 share that the three Russian engineers received, which was  
21 16 percent, that's about \$2 million.

22 Q. Okay. You're aware that both Mr. Kirby and  
23 Max Shatskih were DDK MVPs; correct?

24 A. Yes.

25 Q. Did you research when you were doing this in 2010

1 and '11 how many of those such individuals existed in the  
2 world?

3 A. Yes.

4 Q. How many?

5 A. When I was doing my analysis, there were 15. I  
6 think we've heard testimony at the time there were 12. So  
7 it's a select group.

8 Q. Can you explain to the jury how you came up with  
9 this value of immediate usability and software hardening and  
10 what all that means, please?

11 A. This is really important, as well, because when  
12 you're thinking about this build or buy decision, if you buy  
13 you pay the fee and you've got it right then. You're done.  
14 If you build, not only do you have to incur the cost of the  
15 development, but you also have time, and time is expensive.  
16 If you have to wait two, three, four years to develop a  
17 product and get it into your product and be able to start  
18 generating revenue, there's a cost to that. We refer to that  
19 as an opportunity cost.

20 And so if you're going this long period of time  
21 without being able to use the technology that you want, there  
22 is a real cost to that. So when you license it, the licensee  
23 is going to be willing to pay for that immediate usability.  
24 They're going to say, I can pay you more than the cost of  
25 development so I can use it now, and I don't have to wait for

1 two or three or four years while we build it.

2 Also combined in that is the concept of being first  
3 to market, and this is also important, because if you're the  
4 first party to the marketplace with a new product, the market  
5 recognizes that. It's new, and you're rewarded for it.

6 In this case, what happened is that, you know, we  
7 heard testimony about how they licensed it to Dantz and  
8 PowerQuest while they were still in development. And those  
9 two companies and others, as well, they took that early  
10 license when the product was only partially finished, and it  
11 was new to them. They wanted the technology. So they were  
12 willing to invest time and energy and resources of their own  
13 to debug it, to test it, to harden it is what the term is.  
14 And while that didn't cost StorageCraft anything, it was very  
15 valuable to them.

16 If you're second to market -- so that all happens.  
17 These companies have tested it, know that it works in a  
18 variety of platforms and a variety of settings. If you come  
19 in later and say, hey, I've got some great software, it does  
20 the same stuff that StorageCraft's software does, will you  
21 test, debug it and harden it, the market place is going to be  
22 less receptive of that because they'll say, well, we've  
23 already got a product. It's going to be more difficult to get  
24 that process done. It doesn't mean it won't happen, but it's  
25 more difficult.

1           So there's this benefit of being, one, to use  
2           immediately and another to be able to be the first one that's  
3           there.

4           Q.    Do you consider this an aggressive valuation or a  
5           conservative valuation?

6           A.    I consider it to be a conservative valuation,  
7           meaning that it's at least that.

8           MR. KARRENBURG: Your Honor, I'm going to move on  
9           to a topic on a license that was issued after Mr. Kirby left  
10          StorageCraft, and we designated that as highly confident.  
11          That was the areas where we talked about earlier that you  
12          agreed that Mr. Kirby would had to leave the room.

13          THE COURT: Are you aware of this, Mr. Ensor?

14          MR. ENSOR: I am, Your Honor.

15          THE COURT: So I'll invoke the exclusion again and  
16          again admonish the jury that this is highly sensitive and  
17          confidential information, that your oath as jurors requires  
18          you to keep confidential regardless of the termination of this  
19          case.

20          How long do you think you'll be with this  
21          examination with that topic?

22          MR. KARRENBURG: Like the last one, Your Honor,  
23          10 minutes, 12 minutes.

24          THE COURT: Okay. Mr. Kirby, we have to excuse you  
25          again.

1 Are there others in the courtroom that need to be  
2 excused, Mr. Karrenberg?

3 MR. KARRENBURG: These are StorageCraft employees.  
4 One is somebody who is working with you, Your Honor, and I  
5 think we can trust that person to follow your directions.

6 THE COURT: Yeah. She'll stay.

7 MR. KARRENBURG: And the others are StorageCraft  
8 employees, who is not on anybody's witness list.

9 THE COURT: Thank you.

10 MR. KARRENBURG: Thank you for asking, sir.

11 (Whereupon, Mr. Kirby left the courtroom.)

12 PAGES 192-197 IS UNDER SEAL UNDER SEPARATE COVER

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20 (Whereupon, Mr. Kirby returned to the court  
21 proceedings.)

22 Q. BY MR. KARRENBURG: The third factor you considered  
23 was STC's unwillingness to license the source code. Would you  
24 explain to the jury how that factored into your analysis?

25 A. Sure. This is another important consideration.

1 When you're dealing with something like this, you want to say,  
2 how willing are they to offer a license for this? And if it  
3 would have been a situation where StorageCraft was licensing  
4 the source code willingly to many parties, then that would  
5 give you an indication of how they value it. But as we've  
6 heard, StorageCraft keeps it under guarded lock and key, and  
7 they haven't been willing to license it to anyone. That tells  
8 you that if they were to license it, you probably would have  
9 to pay them a lot of money to pry it out of their hands. So  
10 it doesn't give you a number, but it tells you it's valuable  
11 and it tells you that it's something that's highly prized by  
12 StorageCraft.

13 Q. And the next factor you looked at was STC's revenue  
14 growth. How did that factor into your analysis?

15 A. This is also very important because StorageCraft is  
16 based, the company is built around the VSnap source code, and  
17 they generate revenue. If they were unsuccessful and had no  
18 revenue, it might say, well, this source code really isn't  
19 worth all that much. But that's not the case. Their revenue  
20 has been growing, and they've been very, very successful with  
21 it, which says there is value to this code.

22 Q. Now, what's the final factor you looked at?

23 A. So the final one was I looked at similar software  
24 and source code license rate in the market. So these are  
25 other, other license agreements that are publicly available.

1 And again, I mentioned before, we had a third party go out and  
2 do a search for us, and we asked them to gather other licenses  
3 for source code. And we looked at -- I think we got about 13  
4 that were pretty similar.

5 Now, the tricky part with this is that whenever you  
6 look at other licenses, it's for a different product. And so  
7 some software product, not all software is created equal.  
8 Some is more valuable than others. So it ended up being  
9 difficult to kind of take that and assign a value from those  
10 market rates.

11 But what did emerge, and I already knew this from  
12 my previous experience in dealing with software and source  
13 code, is that a source code license is more valuable than just  
14 a license for the software, for the object code. That's  
15 pretty well commonly understood, and certainly these license  
16 agreements that I reviewed corroborate that.

17 Q. In fact, you reviewed 13 different licenses, didn't  
18 you?

19 A. Yes. Yes.

20 Q. Okay. And did you identify one that you believe  
21 was the best candidate for comparison?

22 A. Well, this third party that we asked to pull these  
23 up, they came back and said, we think this one is most  
24 comparable. And that one has had a one-time license rate of I  
25 believe it was \$17 million. I looked at it and also thought

1 it was comparable, as well. But again, it's a little bit  
2 tricky to try to overlay two different software technologies.

3 Q. Did you look at any others that did have payments  
4 for source code?

5 A. Yes. There was one agreement in particular that  
6 actually memorialized the difference between a license for the  
7 software and the source code, and that was an agreement  
8 between ESPS and Adobe. And Adobe was the licensee in this  
9 case. And they agreed to pay that if they -- let me back up.

10 Sometimes when you license the software the  
11 licensee will actually require the licensor to put the source  
12 code in escrow, is what they call it, and to kind of put a  
13 copy somewhere so if they were to go bankrupt or have problems  
14 that the licensee could get access to it.

15 So this agreement had a provision for that. And it  
16 said that, you know, if something happens to you, ESPS, then  
17 we, Adobe, we can get to the source code. And if that  
18 happens, we'll pay you between 3 and 30 times the normal  
19 royalty rate that we're paying.

20 And I realize that 3 to 30 is a big difference, but  
21 there were some different terms in the agreement, so there was  
22 this wide range. But regardless, what they said is that the  
23 source code is worth 3 to 30 times more than the software  
24 itself.

25 Q. And what was the ongoing annual royalty payments,

1 do you recall?

2 A. In that particular agreement?

3 Q. Right.

4 A. I think the ongoing was 700,000, maybe \$1 million a  
5 year, somewhere in that range.

6 Q. And what did looking at these comparable licenses  
7 tell you?

8 A. Well, again, the big takeaway for me was that a  
9 source code license is more valuable than just a license for  
10 the software. That was really the important takeaway.

11 Q. Before we wrap this up, you're being paid for your  
12 services; right?

13 A. Yes, I am.

14 Q. And what's the rate you charge me?

15 A. 415 per hour.

16 Q. And how does that compare in this community with  
17 others doing the type of work that you do?

18 A. Very comparable.

19 Q. Is that your standard rate?

20 A. That is less than my standard rate.

21 Q. Okay. Now, were any of these factors, any one of  
22 them really more important than the others?

23 A. You know, you really have to look at all of them as  
24 a whole, and they all inform you on what the answer should be.  
25 And so it's not really fair to break one apart or to classify

1 one as more important than the other.

2 Q. And your conclusion again is?

3 A. My conclusion was that a reasonable license fee for  
4 the source code, the VSnap source code that Mr. Kirby  
5 misappropriated from StorageCraft would be at least  
6 \$4.5 million.

7 MR. KARRENBURG: Your Honor, I have no further  
8 questions at this time.

9 THE COURT: Re -- sorry. Cross-examination,  
10 Mr. Ensor?

11 CROSS-EXAMINATION

12 BY MR. ENSOR:

13 Q. Mr. Kilbourne, you and I have spent some time  
14 together in a deposition in this matter, did we not?

15 A. Yes.

16 Q. In that deposition, we talked about your  
17 qualifications at length, did we not?

18 A. Yes.

19 Q. And I asked you -- well, let me take a step back.  
20 You're here to testify about intellectual property; right?

21 A. Yes. About the value of VSnap source code.

22 Q. And that's intellectual property, the VSnap source  
23 code?

24 A. Yes.

25 Q. So you're valuing intellectual property?

1 A. Yes.

2 Q. And in your deposition, I asked you when you got  
3 your bachelor's from BYU if you could tell me a single class  
4 that you took about intellectual property, and you couldn't  
5 name a specific class. Do you remember that?

6 A. Yes.

7 Q. And in your deposition I asked you when you got  
8 your MBA from Wharton, I asked you, hey, can you remember a  
9 specific class about intellectual property? And you couldn't  
10 name a single class. Do you remember that?

11 A. I remember saying that there wasn't a single class.

12 Q. And when we talked about some of your  
13 qualifications, the CMA, do you remember that? What does that  
14 stand for?

15 A. Certified management accountants.

16 Q. And I asked you if you could tell me a single class  
17 that you ever took on intellectual property to become a  
18 certified management accountant, and you couldn't name one;  
19 right?

20 A. That's true; because a CMA doesn't really have to  
21 deal with intellectual property.

22 Q. And the CFE, what does that stand for?

23 A. Certified fraud examiner.

24 Q. And again I asked you, can you -- name a class you  
25 took as part of your CFE training, and you couldn't name one;

1 correct?

2 A. That's probably generally true. I mean, CFE where  
3 there is some relation to intellectual property issues, but I  
4 may very well have said there is not a class because, again,  
5 that would be part of the training but not a class.

6 Q. I went through all of your qualifications, and I  
7 said, name a class for me, and the best you could do is say, I  
8 know I took some continued education a couple years ago. Do  
9 you remember that testimony?

10 A. I don't remember the testimony being that way, no.

11 Q. Now, let's move on to when was the date of  
12 misappropriation that forms the basis for your analysis?

13 A. So it was, I think I would say around 2006, which  
14 if I remember correctly, that's when Mr. Kirby entered into  
15 the settlement agreement and said he had cleared all of the  
16 intellectual property from his computers and his files.

17 Q. And, Mr. Kilbourne, let's talk about factor  
18 Number One. You'd agree with me that the cost of developing  
19 the VSnap source code and bringing it to market provides a  
20 benchmark for the reasonable license fee for the VSnap source  
21 code retained by Mr. Kirby?

22 A. Yes.

23 Q. And that's from your report, is it not?

24 A. Yes.

25 Q. And, in fact, your report also concludes that the

1 cost to create the VSnap source code and take it to market is  
2 estimated to be \$4.5 million. I believe this establishes a  
3 minimum reasonable license fee for the VSnap source code  
4 retained by Mr. Kirby. Does that sound about right?

5 A. Yes.

6 Q. And then you go on to say, the other four factors  
7 support that number?

8 A. Well, they all support each other.

9 Q. So let's talk about Number One. Now, we're talking  
10 about the actual cost to develop the source code; correct?

11 A. We're talking about the costs that somebody else  
12 would have to incur to develop the software plus the value of  
13 being first to market and the opportunity cost of bringing the  
14 software to market. So it's more than just the cost.

15 Q. You're not talking about money actually spent by  
16 STC in developing the source code?

17 A. No.

18 Q. So if your report says STC's actual cost to develop  
19 VSnap combined with its value of immediate usability was  
20 estimated to be over 4.5 million, that would be an incorrect  
21 statement?

22 A. No. You just said -- no. That's a correct  
23 statement. Their cost plus the value of bringing to market,  
24 that's a correct statement. It's \$4.5 million.

25 Q. Right. So part one requires you to look at STC's

1 actual costs, what dollars went out the door.

2 A. Well, again, you can look at STC's costs or you  
3 could look and see what it would cost to build it by the next  
4 person that comes along.

5 Q. I just want to know if when you said STC's actual  
6 cost to develop the VSnap, you meant STC's actual cost. I'm  
7 just trying to figure that out.

8 A. So again, you can look at either the actual cost or  
9 the cost for the next person to do it. And the most relevant  
10 is you can look at the actual cost as a surrogate, but the  
11 most relevant is what would it cost you to do it again. What  
12 would it cost the next person to build it?

13 Q. Your analysis actually relates on STC's actual  
14 cost; right?

15 A. Well, my analysis looked at the time that the  
16 engineers spent and incorporates an estimate of what they  
17 spent as a surrogate to what you would have to spend if you  
18 built it again.

19 Q. So your goal was to figure out how long it took STC  
20 to build the code and figure out how much they spent on it;  
21 right?

22 A. More or less, yes. Yes.

23 Q. And Mr. Kirby testified back in 2007, which is a  
24 long time ago, much closer to when the code developed it took  
25 15 to 20 months to get it done; right?

1 A. Yes.

2 Q. So that's where your 15- to 20-month number comes  
3 from.

4 A. That's correct.

5 Q. And you actually got on the phone as part of your  
6 assignment, and you called Max, the Russian engineer, and you  
7 talked to him once; right?

8 A. That's correct.

9 Q. And during that one phone call, you really were  
10 just curious if it took 15 to 20 months.

11 A. Yes.

12 Q. And you asked him that question, and my  
13 recollection is he told you lots of other things, but he also  
14 told you it took 15 to 20 months to pretty much get it done.

15 A. Yes.

16 Q. So that's where that number comes from.

17 A. Yes.

18 Q. And what you did, if I heard you correct, is you  
19 assumed that all, that Mr. Kirby and all three Russian  
20 developers, were working on it full-time for those two years,  
21 for those 20 months.

22 A. Yes.

23 Q. You assumed that Mr. Kirby -- strike that. You  
24 assumed that the Russian engineers were costing \$250 an hour  
25 each?

1           A.    No.  Again, that number is taken from what  
2   StorageCraft currently charges to its customers for software  
3   development time.  So I was not assuming that the Russian  
4   engineers were being paid 250 per hour.

5           Q.    Well, you're trying to figure out how much it cost  
6   STC; right?

7           A.    Again, as I think I've explained, you can look at  
8   what they spent, and you can look at what you would need to  
9   spend to do it over again.  And the 250 per hour figure is  
10   what it would cost in the marketplace to do it over again.

11           MR. ENSOR:  Your Honor, may I approach the witness?

12           THE COURT:  You may.

13           Q.    BY MR. ENSOR:  Let me have you read a line from  
14   your report.  You can read the whole paragraph if you want,  
15   but I'd like you to start there.

16           A.    STC's actual cost to develop VSnap combined with  
17   its value of immediate usability was estimated to be over  
18   \$4.5 million.

19           Q.    Actual costs apparently don't mean actual costs?

20           A.    Well, perhaps you're getting hung up on the fact  
21   that I used the word actual cost.  And perhaps I would have  
22   better -- been better if I would have stated, you know, their  
23   time plus current market rates.  But really again, when we go  
24   back and look at their actual cost of what they were paid plus  
25   the value of the stock they received, which was for the three

1 engineers was \$2 million, you know, it very easily could be  
2 that the actual cost was much higher than that.

3 Q. Let me tell you what else I'm getting caught up on.  
4 You're using \$250 an hour. You just said that's what  
5 StorageCraft charges for their current engineers; right?

6 A. Right.

7 Q. And we all know this is 2012 and that development  
8 was done over a decade ago; correct?

9 A. Well --

10 Q. Yes or no?

11 A. Yes.

12 Q. And not only was it done over a decade ago, a lot  
13 of it was done in Russia; correct?

14 A. Yes.

15 Q. And obviously, I think you were here when we went  
16 through the business plan, but part of STC's business plan  
17 recognized that Russian engineers are well below market level,  
18 doesn't it?

19 A. Yes.

20 Q. So even though you know all of that is true, you're  
21 still using \$250 an hour? Yes or no?

22 A. Yes. I need to make a correction to what you said.  
23 \$250 is not the current rate. That was the rate that was in  
24 the VMware license which is contemporaneous to when Mr. Kirby  
25 misappropriated the software.

1 Q. Actually current rate is what you said. Let's talk  
2 about the VMware license without getting into any confidential  
3 information. We just looked at it. It was 2006, wasn't it?

4 A. Yes.

5 Q. And the primary software development was done in  
6 this case in 2001-2002; correct?

7 A. Mr. Kirby says 2001, 2002, 2003 and 2004.

8 Q. Well, software development never really ends, does  
9 it?

10 A. I'm not a software developer.

11 Q. STC would tell you that, wouldn't they? They're  
12 always tinkering with it.

13 A. Tinkering I think is different than developing.

14 Q. In 2007 Mr. Kirby testified that it took 15 to  
15 20 months; right?

16 A. Yes.

17 Q. And you called Max and said, hey, Max, it took 15  
18 to 20 months; isn't that right?

19 A. Yes.

20 Q. So not only are you using a \$250 number from four  
21 years later, you're using a number that the Russians were  
22 never paid; right?

23 A. No, I'm not using a number from four years later.

24 Q. Let me back it out. What were -- what was Max paid  
25 in 2001?

1 A. I don't know.

2 Q. You didn't ask him?

3 A. No.

4 Q. Is that because you thought it might result in a  
5 lower damages number?

6 A. No.

7 Q. Did Max work full-time on the VSnap project in  
8 2001.

9 A. Max told me he was working full-time on it for 15  
10 to 20 months.

11 Q. Okay. Did you talk to Denis?

12 A. I did not.

13 Q. You never talked to Denis at all?

14 A. No.

15 Q. Did you ask Denis what he was paid in 2001?

16 A. No.

17 Q. Did you ever find out what Denis was paid in 2002?

18 A. No.

19 Q. Is that because you were worried that it might  
20 reduce your damage analysis?

21 A. No.

22 Q. Now did you ever call Alexey?

23 A. No.

24 Q. Now Alexey and Denis, they're still part of  
25 StorageCraft, aren't they?

1 A. Yes.

2 Q. So you could have called them. I mean, you had  
3 access.

4 A. I spoke to Max, and I got the information from Max  
5 about all of them.

6 Q. Did you ask Alexey what he was paid in 2000 and  
7 2001?

8 A. No.

9 Q. Did you ask Alexey if he was working full-time on  
10 the VSnap?

11 A. No. I asked Max.

12 Q. And Max said Max was?

13 A. Max said all of them were pretty much working  
14 full-time.

15 Q. Mr. Kilbourne, let me direct you to Page 41 of your  
16 deposition.

17 Can I approach, Your Honor?

18 THE COURT: You may.

19 Q. BY MR. ENSOR: I asked you -- well, you remember  
20 this deposition; right?

21 A. Well, I remember it occurred, but I'll need to read  
22 what we discussed.

23 Q. I'm not memorable, is that what you're telling me?  
24 Line 1, Page 41.

25 A. Line what?

1 Q. I'm sorry. Line 1, Page 41.

2 A. Okay.

3 Q. Did he tell you -- I asked you:

4 Did Max, did he tell you who else helped with the  
5 development?

6 And your answer was?

7 A. Yes.

8 Q. Did he tell you what their roles were?

9 A. I don't recall that.

10 I'm reading what I said then.

11 Q. Fair enough. And I asked:

12 During that conversation he told you it took  
13 somewhere around 15 to 20 months, and he explained to you who  
14 else helped on the project; correct?

15 A. I said: Yes.

16 Q. Can you remember anything else he told you during  
17 that conversation?

18 A. I said: No.

19 Q. Now, you didn't tell me during your deposition that  
20 Max told you that Denis and Alexey or Denis and Alex were  
21 working full-time on the project, did you?

22 A. Is this the extent of my testimony in this topic?

23 Q. I'm sure your counsel will point out somewhere if  
24 I'm in error.

25 MR. KARREBERG: No, Your Honor. If he's going to

1 refer to the deposition, I think then we're going to have to  
2 go through the whole darn thing. I mean --

3 MR. ENSOR: Your Honor, I'm cross-examining him.

4 THE COURT: On direct you can bring this back up.

5 Q. BY MR. ENSOR: So you didn't mention anything in  
6 your deposition how Max told you Denis and Alex were working  
7 on it full-time; is that right? At least that testimony?

8 A. Well, we've read nine lines of my testimony, and I  
9 don't see that there. But I do say he told me who else was  
10 working on it. And so clearly I was referring to the other  
11 developers.

12 Q. Now, did you ask STC for any financial records from  
13 2000 to see how much money went to the Russian engineers?

14 A. No. I didn't need that.

15 Q. Did you ask STC for financial information from  
16 2001-2002 about how much money went to the Russian engineers?

17 A. No. Again, I didn't need that.

18 Q. Did you ask STC for financial documents identifying  
19 what other projects those three Russian engineers might be  
20 working on?

21 A. No. I already had testimony from two people  
22 telling me what they worked on.

23 Q. But you didn't talk to either of those people  
24 directly; right? Strike that. You didn't talk to Alex, and  
25 you didn't talk to Denis directly?

1           A.    No.  But I spoke to Max Shatskih, and I had  
2   Mr. Kirby's testimony.

3           Q.    Mr. Kirby's testimony doesn't say anything about  
4   Denis and Alex working on that full-time, does it?

5           A.    I don't recall.

6           Q.    So you take four Russian engineers who are getting  
7   paid substantially less than \$250 an hour and who might not  
8   have been working on the project full-time, and you  
9   extrapolate that to \$2.6 million; is that right?

10          A.    No, that's wrong.  We have three Russian engineers  
11   that were paid and then received \$2 million in stock plus  
12   Mr. Kirby and whatever he was paid and whatever he received in  
13   stock.  It's -- the number of 2.6 to \$3.5 million is  
14   definitely reasonable.

15          Q.    Thanks for reminding me about the stock.  Now, that  
16   stock occurred in 2004; right?

17          A.    I don't recall the exact time.  But --

18          Q.    It didn't happen in 2001, did it?

19          A.    Again, I think 2004 sounds about right.  I just  
20   don't know off the top of my head.

21          Q.    So they weren't getting paid in stock while the  
22   development was going on; is that right?

23          A.    No.

24          Q.    And the other thing is your expert report doesn't  
25   mention anything about that, does it, the stock being part of

1 the value that goes into that 2.6? And I can hand it to you.

2 A. No. No, it doesn't. But not everything I did is  
3 it in my expert report. And again, this calculation is based  
4 on the market rate for software developers around that time.  
5 So that's why I didn't include either the cost of the  
6 developers, whether it was through normal compensation or  
7 through stock-based compensation.

8 Q. My question was much similar. The stock being the  
9 part of the 2.6, that wasn't included in your report; right?

10 A. No.

11 Q. And we didn't talk about that at your deposition,  
12 did we?

13 A. You didn't ask me anything about that.

14 Q. It's not in your report, is it? In fact, your  
15 report makes it pretty clear that the 2.6 million comes from  
16 more engineers times \$250 an hour for 50 weeks a year for up  
17 to 20 months; isn't that right?

18 A. Exactly that's on the board here, yes.

19 Q. And the reason this stock that came in later after  
20 all the development was done is now part of your analysis is  
21 because you realized, oh, no, the Russians weren't getting  
22 paid \$250 an hour a year; isn't that right?

23 A. No, that's not correct. The 250 has always been  
24 based on the market rate that StorageCraft billed out its  
25 software developers around the time of the misappropriation.

1 That's always been the case.

2 Q. So when you say STC's actual costs are important  
3 really wasn't STC's actual cost. That was just a misstatement  
4 by you?

5 A. Again, perhaps I could have worded that a little  
6 bit differently to talk about the actual time that someone who  
7 was going to build it would spend and the time and cost they  
8 would spend, and I was using STC's actual times as surrogate  
9 for that.

10 Q. So you're telling me when you wrote, the cost of  
11 developing the VSnap source code and bringing it to market  
12 provides a benchmark for the reasonable license fee for the  
13 VSnap source code retained by Mr. Kirby and subsequently  
14 transferred to NetJapan's consultant Mr. Crocker, you weren't  
15 talking about STC's actual costs. You were talking about a  
16 hypothetical model of what it would cost to build?

17 A. Again, if you look at my report, it clearly states  
18 what the 250 per hour comes from. And that was never based on  
19 STC's actual cost for the engineers. That's very clear.

20 Q. So when you write STC's actual cost to develop  
21 VSnap, you didn't mean that; right? I understand.

22 MR. KARRENBURG: Your Honor, I object. It's  
23 already been answered.

24 MR. ENSOR: Your Honor, I'm moving on.

25 THE COURT: Sorry?

1 MR. ENSOR: I'm moving on, Your Honor.

2 THE COURT: Thank you.

3 Q. BY MR. ENSOR: And, in fact, you have no idea what  
4 it actually costs STC to develop the VSnap code, do you?

5 A. I don't know what the actual compensation paid to  
6 the engineers were besides the stock compensation. That's  
7 pretty clear and easy to get to. I don't know the rest of it.

8 Q. Moving on to the second factor, it probably will  
9 require Mr. Kirby to leave the room for a minute.

10 THE COURT: It will again, Mr. Kirby. The  
11 comparison with the VMware license?

12 MR. ENSOR: Correct, Your Honor.

13 (Whereupon, Mr. Kirby left the courtroom.)

14 PAGES 218-234 ARE UNDER SEAL UNDER SEPARATE COVER

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11 (Whereupon, Mr. Kirby returned to the  
12 court proceedings.)

13 THE COURT: Let's go ahead and be seated.

14 The significance of the point that we just reached  
15 was that the plaintiff is finished presenting evidence. And  
16 if you've noticed, the parties have cooperated in presenting  
17 all the evidence from any witness at the same time even though  
18 it was technically during the plaintiff's case.

19 The defendant has a witness to call. It will be a  
20 brief witness. Then we need to instruct the jury, which I  
21 think will take about half an hour, and have argument from  
22 each side which will take another hour. That would mean we  
23 could be submitting the case to you somewhere around 3:00 or  
24 4 o'clock and you could have it for decision.

25 That's much later than I said that I would keep

1     you. But with the prospect of having the case submitted to  
2     you today, I think I would strongly recommend that we proceed  
3     so that it can be submitted to you today, and then you can  
4     decide how long you want to deliberate today and whether you  
5     want to come back and deliberate tomorrow. The alternative  
6     would be to leave more substantial parts of the proceedings  
7     for tomorrow and begin deliberation later tomorrow.

8             Do any of you have a significant problem if we  
9     press forward today and attempt to submit the case to you this  
10    afternoon? If you have a significant problem, please raise  
11    your hand.

12            Okay. Then I'd like to proceed, counsel. Does it  
13    present a problem for plaintiff?

14            MR. KARRENBURG: No, Your Honor. I'm surprised we  
15    even get to vote.

16            THE COURT: I'm not saying it's a vote. I'm asking  
17    for a comment.

18            MR. KARRENBURG: I'm even surprised that we have  
19    any input. But I think speaking for both of us, we would like  
20    to press on, too.

21            THE COURT: Mr. Ensor?

22            MR. ENSOR: Likewise, Your Honor.

23            THE COURT: All right. Then, please, call your  
24    witness.

25            MR. ENSOR: Brett Johnson.

1 Mr. Johnson, if you'll stop there and take an oath.

2 BRETT JOHNSON,

3 called as a witness at the request of Defendant,

4 having been first duly sworn, was examined

5 and testified as follows:

6 THE WITNESS: I do.

7 THE CLERK: Thank you. Please state your name and  
8 spell it for the record, please.

9 THE WITNESS: Brett Johnson. B-R-E-T-T,  
10 J-O-H-N-S-O-N.

11 THE CLERK: Thank you, please take a seat.

12 DIRECT EXAMINATION

13 BY MR. ENSOR:

14 Q. Mr. Johnson, you are STC's in-house counsel?

15 A. I am.

16 Q. How long have you held that position?

17 A. Since January of 2009.

18 Q. Prior to that, you worked for a law firm?

19 A. I did.

20 Q. And what law firm was that?

21 A. Immediately prior Snell and Wilmer.

22 Q. And you represented STC as their outside lawyer  
23 while you were at Snell and Wilmer; correct?

24 A. Yes.

25 Q. In fact, some of the deposition testimony we've

1       gotten to read you were there?

2               A.     I was there, yeah.

3               Q.     Now, STC's been in litigation with Symantec and  
4       NetJapan, as well; right?

5               A.     Yes.

6               Q.     And in those cases, both of those cases, an expert  
7       was identified to pull the source codes from both sides and  
8       compare them; is that correct?

9               A.     Experts were identified, yes.

10              Q.     And in this case, STC never asked the Court to --  
11       well, strike that. In this case, STC never asked the Court to  
12       establish an expert to try to identify the source codes; is  
13       that correct?

14              A.     That is correct.

15              Q.     In this case, STC did not try to subpoena NetJapan  
16       and get the source code for the ActiveImage Protector product;  
17       is that correct?

18              A.     That's correct.

19              Q.     In this case, even though LeapFrog owns part of the  
20       source code for the ActiveImage Protector product, STC did not  
21       issue a subpoena to obtain that source code from LeapFrog, did  
22       they?

23              A.     I don't recall on that one.

24              Q.     And STC could have called any of the Russian  
25       engineers to come testify, but they chose not to do so;

1 correct?

2 A. It wasn't necessary.

3 Q. And STC as you know has entered into a settlement  
4 agreement with NetJapan dated March 2009, approximately?

5 A. That's correct.

6 Q. And if you, STC, thinks NetJapan is using any of  
7 its confidential information it can file a demand for  
8 arbitration against NetJapan; correct?

9 A. That's true.

10 Q. And that demand for arbitration -- well, the actual  
11 arbitration would take place in Hawaii; right?

12 A. I don't recall. That sounds good to me, though.

13 Q. It sounds good to me, too.

14 Do you see that?

15 A. I do.

16 Q. Does that refresh your recollection that if STC  
17 feels NetJapan is using any of its confidential information it  
18 can file a demand for arbitration and the arbitration will be  
19 heard in Hawaii?

20 MS. SNEDDON: What exhibit is this? 55?

21 MR. ENSOR: 55.

22 THE WITNESS: Yes. Assuming that this is the  
23 NetJapan-StorageCraft settlement agreement from 2009 that  
24 appears to be correct.

25 Q. BY MR. ENSOR: So this is the agreement; right?

1 A. It looks to be, yes.

2 Q. And back to that page, STC has dispute resolution  
3 procedure inside the United States. It can use it if it feels  
4 NetJapan is doing anything wrong with its confidential  
5 information that it got over the years from STC?

6 A. That I don't know. I know that this would apply to  
7 a breach of the settlement agreement. I don't recall the  
8 scope of the arbitration provision itself and whether it would  
9 apply to any dispute.

10 Q. Well, the breach of a -- the settlement agreement  
11 would require NetJapan to return all confidential information  
12 that STC gave them; correct?

13 A. It has provisions relating to the confidentiality,  
14 yeah, the return of confidential information.

15 Q. I can go through it, but Page 9. This is the kind  
16 of information that NetJapan was required to return; is that  
17 right?

18 A. Yes.

19 Q. Has StorageCraft, STC, filed an arbitration against  
20 NetJapan?

21 A. Not yet.

22 Q. Thank you.

23 THE COURT: Cross?

24 MR. KARRENBURG: Yes, sir.

25 //

CROSS-EXAMINATION

BY MR. KARRENBURG:

Q. Mr. Johnson, the settlement agreement said they had to return any confidential information they got from us; correct?

A. That's right.

Q. And that would be the subject for an arbitration; correct?

A. That's right.

Q. If they got information from Mr. Kirby after the settlement agreement, is that covered by the settlement agreement?

A. I would assume it would not be. I would have to review the agreement itself, but that would surprise me.

Q. And have -- you said we haven't sued NetJapan. Has the company made that decision finally or not yet?

A. No.

Q. Is it under consideration?

A. Yes.

Q. Okay. Now, we didn't learn that Mr. Kirby had even been hired by NetJapan until way into this litigation; isn't that correct?

A. Mr. Crocker?

Q. No. Mr. Kirby, that he had been hired by NetJapan to work on the AIP product until after actually the original

1 discovery was completed?

2 A. Oh, yes, that is absolutely true. We had learned  
3 that Mr. Kirby was hired by NetJapan as I recall on the eve of  
4 his first deposition in the case, which was -- we were  
5 probably well over a year into the lawsuit by then.

6 Q. And then we did -- we had asked in motions to  
7 compel to be allowed to get to LeapFrog software; isn't that  
8 correct?

9 A. Yes.

10 Q. And those motions were heard by a certain  
11 magistrate in here?

12 A. Yes.

13 Q. And were they granted?

14 A. No.

15 Q. And, in fact, let's look at my letter to Mr. Ensor,  
16 which is Exhibit 224. Would you read that to the jury since I  
17 don't have that on our system?

18 A. Sure. A letter from Tom Karrenberg to  
19 Richard F. Ensor, dated September 13th, 2010.

20 As the individual depositions of both Russ -- at  
21 the individual depositions of both Russ and Tom Shreeve you  
22 asked about what information StorageCraft possessed concerning  
23 the possible use by Rectify of the StorageCraft VSnap source  
24 code. You also listed that as a topic in the 30(b)6, and you  
25 also asked about it in the 30(b)6 deposition of Russ Shreeve

1 this morning. As you know, because of the rulings you  
2 obtained from the Magistrate Nuffer and -- because of the  
3 rulings you obtained from Magistrate Nuffer and were upheld by  
4 Judge Benson we are precluded in this case from pursuing  
5 discovery along those lines. However, since you continue to  
6 raise that issue I suggested to you at the deposition this  
7 morning a very simple way to resolve those questions which you  
8 keep asking, simply I suggested that since Rectify is also a  
9 client to your law firm that you arrange to obtain that source  
10 code and I will arrange to obtain the VSnap source code at  
11 StorageCraft. We can then agree on a special master who can  
12 examine the source codes to determine if there has been any  
13 copying. We can split the cost between us.

14 I believe this would get you the exact answers to  
15 the questions that you continue to raise and would resolve the  
16 issue once and for all and in the most efficient way possible.  
17 Please let me know if you agree with this proposal. Very  
18 truly yours, Tom.

19 Q. Thank you. Did Mr. Ensor take us up on that?

20 A. To my recollection, he never responded.

21 Q. That was even more efficient than asking the Court  
22 for a special master, isn't it?

23 A. My bill was smaller, yes.

24 Q. And one final thing. Area. Where's NetJapan  
25 located?

1 A. NetJapan is located in Japan.

2 Q. And you were here when Mr. Kirby testified that  
3 that's where the source code is located?

4 A. Yes.

5 Q. Is NetJapan signature to the Geneva Convention for  
6 the provisions of doing international discovery?

7 A. They are not.

8 Q. Do you know how easy it is to get discovery in  
9 Japan?

10 A. It's virtually impossible. In the  
11 NetJapan-StorageCraft lawsuit, that was one of the continuous  
12 battles we fought for, you know, well over two years. They  
13 had the benefit of our legal system and could get really any  
14 discovery from us, but it was virtually impossible to get  
15 discovery from them in Japan. It would have been a losing  
16 proposition to try to subpoena NetJapan.

17 Q. Thank you.

18 THE COURT: Redirect?

19 REDIRECT EXAMINATION

20 BY MR. ENSOR:

21 Q. September 10th, 2009, that's when you took the  
22 first Jamey Kirby deposition in this case, and that's when you  
23 learned he was working for NetJapan; right?

24 A. To the best of my recollection, yeah.

25 Q. So it's been over two-and-a-half years since you've

1 known that, and you still haven't filed for arbitration in  
2 Hawaii, have you?

3 A. I'm not aware of the basis under the settlement  
4 agreement to arbitrate against NetJapan over that.

5 Q. You think the settlement agreement says they can  
6 use your confidential information?

7 A. I think the settlement agreement has provisions  
8 relating to the return of confidential information they  
9 received from us and certain representations about their  
10 destruction of that confidential information. To my  
11 recollection, it doesn't address their misappropriation -- or  
12 their obtaining our source code from a third party.

13 Q. Have you filed suit against NetJapan here in the  
14 United States?

15 A. Not yet.

16 Q. And, in fact, you actually -- you got discovery  
17 from Rectify in this case, and you got discovery from LeapFrog  
18 in this case; right?

19 A. We got some. I know in discussions with LeapFrog's  
20 counsel LeapFrog was reluctant to produce some of what we  
21 asked for because NetJapan had threatened to sue them.

22 Q. Well, they ended up producing 3- or 400 pages of  
23 e-mails, didn't they?

24 A. They did produce in documents.

25 Q. And Rectify also ended up producing I think close

1 to 500 pages of e-mails. Does that sound about right?

2 A. I don't recall the exact count.

3 Q. But Rectify did produce the e-mails. You recall  
4 that?

5 A. They did produce documents.

6 Q. And if any of those implicated any sort of use of  
7 STC's confidential information, we've seen them by now; right?

8 A. I'm sorry. I don't follow the question.

9 Q. Well, I haven't seen very many of those documents  
10 as trial exhibits, so my assumption is they weren't real  
11 relevant.

12 A. Is that a question?

13 MR. ENSOR: No more questions.

14 MR. KARRENBURG: Just quickly.

15 RECROSS-EXAMINATION

16 BY MR. KARRENBURG:

17 Q. When we took, served the subpoena on LeapFrog, we  
18 had to get an order from the Court to do so, didn't we?

19 A. We did. We had to fly to California and file it.

20 Q. And we were actually precluded from asking for the  
21 source code in the leave of court. We got to serve that  
22 subpoena, weren't we?

23 A. We were, due to the intervention of NetJapan.

24 MR. KARRENBURG: That's all I have.

25 THE COURT: Follow-up?

1 MR. ENSOR: We rest, Your Honor.

2 THE COURT: All right. Any case in rebuttal?

3 MR. KARRENBURG: No, sir.

4 THE COURT: You can step down, sir.

5 Ladies and gentlemen of the jury, we'll take a  
6 recess until 25 till. Then I will instruct you on the law,  
7 and we will hear argument from counsel. And the case will be  
8 submitted to you for your decision. All rise.

9 (Whereupon, the jury left the court proceedings.)

10 THE COURT: Counsel, I'm guessing it's going to  
11 take 20 to 30 minutes for me to read these instructions. And  
12 then can we keep you each to a half an hour?

13 MR. KARRENBURG: Yes, sir. I think that's the  
14 outset. We got through this, got it presented I think both of  
15 us pretty well. The facts came out. So I think we can be  
16 pretty efficient.

17 THE COURT: Okay. I would like you to appoint --  
18 how do you want me to keep time, because I don't know what to  
19 do to you when you go over your half hour.

20 MR. KARRENBURG: Well, Judge, feel free to ask me  
21 to hit Rick.

22 MR. ENSOR: Your Honor, I was going to suggest you  
23 put Tom in jail.

24 THE COURT: Well --

25 MR. KARRENBURG: Judge, he's delightful. And like

1 I told you before, we fight like heck on the merits.

2 THE COURT: How long?

3 MR. KARRENBURG: You know, Judge, I'll watch it,  
4 too. I'm going to reserve five minutes of rebuttal.

5 THE COURT: 25 and 5.

6 MR. KARRENBURG: Maybe when I'm getting to about  
7 five minutes left, if you'll holler at me. But I'll be at  
8 side glancing at the clock.

9 THE COURT: Would you have -- well, you'll be doing  
10 exhibits, won't you?

11 The other issue I want to discuss, I'll signal you  
12 at 25 and I'll signal you at 30.

13 MR. JOHNSON: Margaret said she would be happy to  
14 watch the clock.

15 THE COURT: How do you get the people's attention  
16 when they're faced away from you.

17 MARGARET: We can just let them know, speak up.

18 THE COURT: Okay. I'll give you that  
19 responsibility.

20 Is this our original set of exhibits?

21 MR. KARRENBURG: Yes, sir. We're going to have to  
22 remove the ones that have not been in.

23 THE COURT: I'll ask the clerk to do that while we  
24 instruct and argue. And then we'll send the jury into the  
25 juryroom, and you can check the exhibits while they're

1 assembling in the juryroom, they always take some time,  
2 anyway, and verify that we have segregated them correctly.  
3 Does that sounds all right?

4 MR. KARRENBURG: I believe so, sir.

5 THE COURT: So let's make sure we have everything  
6 on the cart because we'll wheel it in the clerk's office now.  
7 So we're in recess.

8 (Recess.)

9 MR. ENSOR: Judge, can they stay as long as they  
10 can?

11 THE COURT: They can. We accommodate that. The AC  
12 shuts off here between 6:00 and 6:15, but we keep it on as  
13 long as they want to continue.

14 MR. KARRENBURG: I've gone as late as 1 o'clock in  
15 the morning for the jury trial.

16 THE COURT: That doesn't say much for your advocacy  
17 skills.

18 MR. KARRENBURG: Both times I won.

19 THE COURT: They didn't want to come back and see  
20 you another day.

21 MR. KARRENBURG: That is probably true. Between the  
22 two things, they really have great judgment.

23 THE COURT: There's no telling. We finished our  
24 trial last week at 6 o'clock and deliberations on Friday.

25 (Whereupon, the jury returned to the court

1 proceedings.)

2 THE COURT: Members of the jury, we have copies of  
3 these final instructions for you, and those will remain with  
4 you. There is one set of official instructions and one  
5 official verdict form. Those are your personal copies, so you  
6 can mark on those. I ask you not to mark on the official jury  
7 instructions and not to mark on the verdict except as  
8 directed, and you'll have instructions about that.

9 Did you distribute the verdict form to the jury?

10 THE CLERK: I have not.

11 THE COURT: Could you, please?

12 (Whereupon, more instructions were given.)

13 THE COURT: We will now proceed with the arguments  
14 of counsel, and then you will retire as a group to deliberate  
15 and reach your verdict.

16 Mr. Karrenberg, I understand that you want to  
17 allocate 25 minutes to your principal argument and five for  
18 reply?

19 MR. KARRENBURG: That's correct, Your Honor.

20 THE COURT: All right. Thank you. You may  
21 proceed.

22 MR. KARRENBURG: If it please the Court, counsel,  
23 ladies and gentlemen, first of all, sincerely on behalf of  
24 myself, my co-counsel and even on behalf of my colleague and  
25 friend Mr. Ensor, we want to thank you for your participation

1 in this. We know it's inconvenient for you to come to listen  
2 to us for four days. But you want to know something? This is  
3 the pinnacle of the American justice system. Jurors, 12  
4 regular people just like the rest of us get to decide. Not  
5 somebody in Washington, not somebody up on the hill here, but  
6 people. It really is. It's a system that I'm really proud  
7 of.

8 As you know, as the Judge has instructed you, you  
9 are to decide this on the evidence, so I'm going to try to  
10 review some of the evidence that has been presented. First of  
11 all, I'd like to remind you what I said in the beginning.  
12 First of all, I warned you that I was coming back, and I'm  
13 impressed that you hung around long enough to see me again.

14 But seriously, it's already been determined that  
15 Mr. Kirby breached the contract and that he infringed our  
16 copyright. The real issues we have to decide here today are,  
17 do we have a trade secret? And did he misappropriate it in  
18 connection with the copyright claim, the trade secret claim?  
19 Was that willful? And if so, that has some damage  
20 consequences. And also, what are the damages for all three  
21 claims? And I'm going to look at that evidence. And I think  
22 it's important to look at the history a little bit.

23 As I think we've established pretty clear and  
24 there's not much in dispute, Mr. Kirby was the architect and  
25 the developer of the VSnap source code. He's assisted by the

1 Russian engineers, as you've heard quite a bit, and that  
2 product is used in virtually every one of STC's products. It  
3 is the central core of my client's business.

4 Now, Kirby knowingly and understandably transferred  
5 to STC by the assignment. It's Exhibit 41. Don't have to go  
6 through it again. But this is what you saw. This was the  
7 assignment which included the VSnap source code. And as you  
8 see, he received considerable consideration which we covered  
9 during the trial and did end up with 35 percent of the company  
10 between him and his wife, which at the time it was valued at  
11 at least \$12 million, which in other words, is a \$4.2 million  
12 receipt value.

13 Also I think we've established without a doubt that  
14 Mr. Kirby knows the value of the source code and its  
15 importance. Prior to the merger in developing this -- and he  
16 did a darn good job developing it. You even heard him say  
17 that he wanted to make sure this was very good software.  
18 That's why he got this consideration. But he always made  
19 sure, him and the Russians in Moscow, made sure all copies of  
20 it even electronically had the copyright notice and, just as  
21 he said, for the purpose of protecting it. Mr. Kirby was an  
22 extremely experienced software engineer, in fact, a DDK MVP as  
23 designated by Microsoft. At the time, only 12 in the world.

24 Now, right after the merger, he resigns. And we'll  
25 put up Exhibit 60. This is his resignation. It's

1 November 12, 2004. And I know he says he called somebody.  
2 But even here, this is what he actually said. Effective  
3 immediately, November 12th.

4 And he claims he did that, kind of an odd  
5 explanation, but he says they stole his company. He didn't  
6 mean they stole it. He meant they just took it over. But he  
7 entered into these agreements willingly. And he didn't like  
8 the fact that there was going to be a nondisclosure agreement,  
9 confidentiality agreement, he didn't like the at will  
10 employment agreement. But remember something, as Mr. Jeff  
11 Shreeve said in the beginning, everybody was signing those.  
12 This wasn't directed at him personally. This is what they  
13 were responsible for. And at this time between the Russian  
14 engineers who he had the relationship with and he and his  
15 wife, they controlled 51 percent of the company.

16 There was no reason to be that upset. Nonetheless,  
17 he did. And as he said, he bailed. He admitted it right  
18 here. And when did he bail? Just as his company is being  
19 formed, just as he actually got a million-two from an overseas  
20 investor, just as it's about to get out, and he's the chief  
21 developer of our code, the chief architect. It was the most  
22 critical time in a company's existence, and for whatever  
23 reasons, he decides to bail.

24 But let's look at some of the things he did  
25 beforehand. Let's look at Exhibit 57. Exhibit 57 is when we

1 learned nothing, not too long at that time, that he had  
2 downloaded the software in various places. And, of course,  
3 STC was concerned. It wants to protect its core business. It  
4 knows Kirby is working for competitors. Remember we called  
5 him up after he resigned and called him back. And Mr. Jeff  
6 Shreeve called him and he asked for Kirby. Kirby is there,  
7 and he wouldn't even talk to him.

8 We know he has at least one copy of the source  
9 code, if not more. And if we look at Exhibit 46, he says  
10 we'll get it back in here. But he also tells us -- doesn't  
11 say anything about the DVD and CD he loaded it to. And he  
12 also says that any further contact by any employee, board  
13 member or any legal representative of StorageCraft would be  
14 considered harassment, so he won't talk to us. So the lawsuit  
15 ensues. We don't need to go through that.

16 But he signed that settlement agreement,  
17 Exhibit 48. This is the contract that the Court has found  
18 that he already breached. And we went through it, so I don't  
19 think I really need to highlight all the terms. But basically  
20 as you see, he promised that he didn't have anything, or would  
21 return it, doesn't have it. In fact, he claims he had done it  
22 before he even signed this, remember? He scrubbed everything  
23 before. That's what his story was.

24 If you go to the second page, he went on further in  
25 this paragraph to warrant, and the Court has instructed you

1 what a warranty is, that he doesn't have it. And if we go  
2 down the last paragraph on this page, he was also going to  
3 cooperate in protecting it. That was his deal. And then he  
4 said he also checked again, okay?

5 Turns out all the reps and warranties are false.  
6 The trouble begins then with NetJapan. They appoint Crocker  
7 to the board, who resigns five days later. Immediately  
8 becomes a consultant with Burbidge and Mitchell, Kirby's  
9 former lawyers now representing NetJapan. Quite acrimonious  
10 litigation. No doubt about it. That's been resolved. But  
11 Kirby is all too willing to help NetJapan. Despite saying he  
12 won't talk to anybody from StorageCraft, he immediately is  
13 willing to talk to Crocker. In fact, let's look at  
14 Exhibit 63.

15 Exhibit 63 was when they said they need his help,  
16 and he immediately said, I will help if I can. And, of  
17 course, they didn't take him up on the idea to drink Cocaine,  
18 but they did want a glass of wine with him. And they said  
19 Crocker's going to contact him.

20 What else has he previously done? And I think this  
21 is important for some of the questions you've got to answer on  
22 the verdict form. Let's look at Exhibit 59. This is where  
23 he's talking to his friend, wants to set up a company. He's  
24 going to go -- this is November 4th. Now he says it's after  
25 he verbally resigned. But there's no doubt it's before he

1 submitted his resignation effective immediately. He's trying  
2 to set up competing products.

3 And let's go to the second page. More importantly,  
4 he's also wanting to get the Russian engineers to go with them  
5 if they bail. That's how loyal he was to this company.

6 And what else did he do? Let's look at Exhibit 61.  
7 61 is the e-mail he sent, here there's no doubt it was after  
8 he resigned, two days after his letter to Symantec. And what  
9 does he tell Symantec? Let's go to the second page. That  
10 he's recommending that they begin litigation against some of  
11 the StorageCraft personnel, and he even admits it's for a  
12 little revenge. And he claims, he claims that it's because  
13 they violated the nondisclosure agreements with StorageCraft.

14 Yet, you heard me read his testimony from 2007  
15 where he admitted under oath in questioning from his former  
16 lawyer that that didn't happen. And you've had an instruction  
17 from the Court, if you believe any witness has intentionally  
18 testified falsely about any important matter, you may  
19 disregard the entire testimony of the witness.

20 Ladies and gentlemen, I think it's appropriate  
21 here, because there was no doubt of what he testified to in  
22 2007. He didn't even know what the agreement said. He said  
23 they were real careful to make sure they didn't do that. And  
24 they didn't talk about any of the products. And then what did  
25 he do? Because he's annoyed, he's mad, he makes up a lie and

1 tells it to PowerQuest to try to get a lawsuit going, which  
2 never happened, by the way. And then he lies to you, as well,  
3 despite his sworn testimony.

4 And what else does he say why he didn't get  
5 everything off the disk? Well, he said he couldn't run his  
6 Outlook searches in a heartbeat. And with respect to his  
7 searches, he said, there's a quote, I could have been more  
8 diligent. I concede that. And what else did he say? I was  
9 not inclined to go to that much effort.

10 This is a guy who made a contract. That's why I  
11 asked him that question. Do you think you're supposed to live  
12 up to your contracts? A contract to make sure that didn't  
13 happen. And just because he wasn't inclined to give it the  
14 effort, he doesn't have to follow his contracts.

15 The only thing that kind of attitude does in this  
16 country is make lawyers like all of us here rich because you  
17 end up with lawsuits over the thing instead of just people  
18 living up to their word. If people lived up to their word  
19 half the time we wouldn't be over here.

20 Okay. And he claims -- what does he also claim?  
21 Oh, I did look. I checked the names of the software  
22 engineers. Max Shatskih's name, you're going to have these  
23 boxes back there, is on every one of these e-mails that has  
24 the source code on it. And don't forget, he knew and admitted  
25 that they had sent thousands of e-mails with the source code

1 on it. He knew it was out there. How he can miss  
2 Max Shatskiy's name is impossible.

3 He admitted he could check VSnap. If you find  
4 VSnap, you'd find all the attachments. And then you know all  
5 he had to do? Is delete, delete, delete to the delete file.  
6 Delete, delete to the delete file. We all do it. It's easy.  
7 It wouldn't have been there. And what else did he do? If you  
8 remember, afterward he even tried to recruit Max to the  
9 NetJapan lawsuit.

10 You know, something else that I think is very  
11 interesting is to the credibility of the witnesses. Neither  
12 he nor Crocker could remember a darn thing about anything they  
13 said in any of the meetings; right? It's also interesting  
14 that every computer Kirby, who's a longstanding computer  
15 expert as he admitted, either crashes or has been cleaned or  
16 doesn't know or thrown out or is now in a garbage can. I'm  
17 telling you if that many computers crashed we wouldn't have a  
18 computer industry in this country. It wouldn't make any  
19 sense.

20 The rest of the story also doesn't make any sense.  
21 Kirby says Crocker told me he was on the board. What does  
22 Crocker say? I never told him that by the time I went there.  
23 And one thing we do know Kirby has only been introduced from  
24 NetJapan who he already knows is planning a lawsuit doesn't  
25 even check if he's really on the board. It just takes an

1 e-mail. Find out. He would have found out no.

2 Then he says, what does Kirby say? He just wanted  
3 the settlement agreement. Well, if he's on the board the  
4 settlement agreement was in our files. Why would he have to  
5 go all the way to California to get that?

6 What did Crocker say? Kirby actually wanted to  
7 give me a lot of documents. And that's why we didn't have  
8 time enough to get it done before we actually got to lunch.  
9 And what else was on there? All of his confidential  
10 information with his lawyers over the lawsuit he had done with  
11 my client. And what does he say? Oh, I gave it to him  
12 because he was going to give it to StorageCraft. Absolutely  
13 unbelievable. You don't give your confidential privileged  
14 communications with your lawyer to the other side of a  
15 lawsuit. But what do we do know? He gave the disk to  
16 StorageCraft -- I mean to NetJapan.

17 And can you imagine in the middle of that  
18 acrimonious discovery we get documents from NetJapan, and my  
19 clients are going through them, and guess what? They're  
20 seeing their business, the core of their business right on the  
21 screen in front of them as they're going through the  
22 documents, and despite the fact that they've got a written  
23 agreement from them. What do we try to do? We try to get  
24 Dickson Burton down here to talk to them to find out what  
25 happened with this stuff. Wouldn't even talk to us.

1           So what else do we do? Well, we're back here now.  
2       Okay. And what happened to those? Well, Crocker's memory is  
3       faulty on that as it is with the conversations between him and  
4       Kirby. But let's look at what he does say in his deposition.

5           Can we go I think it's 99 first? This is Crocker,  
6       Page 99.

7           Besides Rod Parker at Snow Christensen, did you  
8       provide the CD or any part of the PST file to anyone else?

9           Yeah. I believe I gave it to Burbidge and  
10      Mitchell.

11          Of course, we're going to run out of time. I'm not  
12      going to go through more, but that's in there. You heard him.  
13      Twice he said he gave it to Burbidge and Mitchell. He also  
14      said he probably also gave it to NetJapan because when he sent  
15      something to Burbidge and Mitchell he gave them both. And he  
16      sent it in e-mails. And all of this is attached to e-mails.

17          Now, where does that lead to? After the settlement  
18      he immediately ends up getting a \$15,000 a month job. Now,  
19      Campbell who they rely on from LeapFrog says he didn't do a  
20      darn thing. He was useless. So why is NetJapan paying him  
21      \$15,000 from March '09 all the way through to today if he  
22      didn't do anything? Campbell doesn't know what he did with  
23      the -- on the NetJapan e-mails, and that's also interesting.  
24      Why? Because the NetJapan e-mails are the ones he can't get  
25      supposedly, but, of course, all he had to do is ask these very

1 people that he talked to every day and that's where the  
2 information would have been. Oh, but I can't get that.  
3 That's over in Japan. But I can get my 15 grand a month out  
4 of Japan. I can use my Rectify e-mail which started later  
5 which is on the NetJapan server and give that to us, and he  
6 doesn't even have a reason why not.

7 Let's get to the claims. Copyright infringement  
8 has already been found. We're asking for statutory damages.  
9 You can go up to 30,000 if you don't find he did it willful.  
10 That's what the law of the United States says. If you find he  
11 was willful, you can go up to \$150,000. What's willful? It  
12 includes reckless disregard. Can you think of anything more  
13 reckless than somebody saying, well, I should have been more  
14 diligent. I really wasn't inclined to put that much effort  
15 into it. That's from his own words the definition of reckless  
16 disregard for my client's rights. I think without a doubt  
17 we've proved it's willful.

18 What else do we have to prove? It's a trade  
19 secret. I think that's beyond peradventure. You heard the  
20 Shreeves tell how important it is. You heard what we go  
21 through to protect this code, what it means to us, how  
22 important it is. There's no doubt it's a trade secret. And  
23 again, you're going to have to find there is a question  
24 because it has some consequences with what the Judge does on  
25 whether or not it is willful and malicious. I think you all

1 should find that, as well.

2 And then finally the contract, well, we already  
3 found he breached the contract. So what are the damages? The  
4 Judge said consequential is all out. These are the  
5 consequential damages, the minimum royalty. And the minimum  
6 royalty is what Patrick Kilbourne testified to. You haven't  
7 heard anybody here testify to anything different. Okay? They  
8 all -- and you've seen instructions that say you can create  
9 that hypothetical in order to prove these kind of damages.

10 And what choice do we have? This is our only  
11 remedy, ladies and gentlemen. We can sue in a lawsuit. We  
12 don't have Sharia law where you cut the hands of a thief off.  
13 All we can do is come to court and ask for relief. And one  
14 thing that is a limitation in our system, good, bad or  
15 indifferent, it is what we have, the only thing we can get in  
16 court is monetary damages. Same with any other lawsuit. You  
17 lose your arm, no one can give you back your arm. But if it  
18 was a negligent act that caused that harm, you can get  
19 monetary relief. That's all the Court is really empowered to  
20 do to give us a remedy.

21 And the fact that we have been successful since  
22 then is not a license for him to be allowed to steal. And he  
23 knew what he was doing.

24 Ladies and gentlemen, here's the verdict form. You  
25 have it as well as I do. First question is, what amount of

1 damages, if any, was caused by Kirby's breach? I suggest you  
2 put the \$4.5 million in. You heard Mr. Kilbourne's analysis.  
3 It's been uncontested. There is no other witness. That is a  
4 minimum reasonable royalty. And the fact what he used it for  
5 we don't know it. But to get it that's what he would have had  
6 to pay.

7 MARGARET: Five minutes, Mr. Karrenberg.

8 MS. KARRENBURG: Thank you.

9 The Court has previously determined that he is  
10 liable for having alleged the copyright. Was it willful?  
11 Yes. Statutory damages? I suggest \$150,000. Did he  
12 misappropriate our trade secret? I don't think that's even an  
13 issue at this point. That's yes. And what amount of damages,  
14 if any? 4.5 million.

15 It's lot of numbers, but that's what it is. That's  
16 what it would have cost for him to get that and use it and  
17 disclose it the way he did. And was it willful? Was it  
18 reckless? Was it malicious? Did he know what he was doing?  
19 Should he have known better? Absolutely. The answer to that  
20 is yes.

21 I'll have a few more moments in a little bit to  
22 come back. But I want to thank you for your time and for your  
23 service. Thank you.

24 THE COURT: Mr. Ensor?

25 MR. ENSOR: Opposing counsel and I certainly agree

1 on one thing, and that's the value of your service. He is  
2 correct. It is the foundation of our legal system, and it's  
3 an incredibly important duty. And on behalf of my client and  
4 the Court we thank you.

5 I started off by telling you there would be seven  
6 facts in this case that would be established, and they have  
7 been. Jamey Kirby is an extremely talented software  
8 developer. Now, there's very little dispute about that. It  
9 turns out on the two parts of the trade secret, the Snapshot  
10 driver and the incremental sector tracking, which  
11 Mr. Karrenberg I don't think mentioned once in his closing,  
12 Mr. Kirby didn't write those for NetJapan. Bob Campbell wrote  
13 the incremental sector tracking. You saw his testimony. It  
14 was clear as day. And NetJapan used the Volsnap from  
15 Microsoft because it's free, and it's been on every single  
16 version on the Windows program for the last 10 years. So that  
17 fact is established.

18 NetJapan was a partner, not an adversary in STC.  
19 That was fact Number 2. NetJapan owned 41 percent of STC.  
20 You saw the internal correspondence from Mr. Shreeve to  
21 NetJapan calling them a committed partner, how they're honored  
22 in the partnership, how they're looking forward to doing  
23 things together, how -- and he testified eventually after he  
24 moved away from his testimony that he didn't really mean  
25 partner and it was just a Christmas card word, that, yes, they

1 were close. Yeah, they depended on each other.

2 The third fact was that Kirby didn't know he had  
3 the e-mails. Now, it's easy to point to 18,000 pages, but the  
4 fact of the matter is there's 11 copies of the VSnap in there,  
5 spanning 2001, 2002 and halfway through 2003. Each copy of  
6 the VSnap is 1,000 pages, so that's 11,000 pages right there.  
7 I wouldn't get caught up on volume. I think the point you  
8 ought to take away from that is Mr. Kirby testified and  
9 Mr. Barnes testified that this code is sent around a lot by  
10 e-mail. It was sent between Mr. Kirby and Max over in Russia  
11 all the time as they were developing it, and it was sent to  
12 clients who had licenses. It was sent. Mr. Barnes sent it a  
13 lot. Mr. Kirby testified hundreds, if not thousands of times.  
14 There's 11 in there, and that's bad that he missed it. And he  
15 shouldn't have missed it. He should have caught those. But  
16 11 out of 4- or 500 is not reckless. It's not intentional.  
17 It's an accident.

18 Now, I told you that the deposition transcripts  
19 wouldn't be fun, and I think that was true. But they did  
20 establish that Crocker worked for NetJapan. He was their  
21 representative on the board. He was the person that they  
22 hired to try to protect their involvement. He didn't see STC  
23 and NetJapan as adversaries in the sense that these guys do  
24 now five years later when they're fighting for market share.  
25 NetJapan owned 41 percent of the company. Mr. Crocker was

1 just trying to find out how he could protect that, how he  
2 could make sure that all the money they put into STC would be  
3 preserved.

4 The testimony not -- you heard much from  
5 Mr. Crocker. Mr. Crocker's recollection over the years is not  
6 100-percent clear. But he testified very clearly that, one,  
7 he never gave that disk to anyone other than his lawyers. And  
8 when Mr. Karrenberg says NetJapan produced that disk in  
9 discovery, he's wrong. Mr. Crocker produced it in discovery.  
10 And he went through that disk. He found some e-mails that was  
11 relevant, and he may have shared those with Burbidge and  
12 Mitchell. But if you remember right at the end of his  
13 examination I put every single source code in front of him,  
14 and I said, is this the kind of stuff you find relevant? And  
15 he said, of course not. I don't know even know what that is.  
16 And, of course, there was no evidence that it was sent to  
17 Burbidge and Mitchell, either. It's just more speculation.  
18 That was the fifth fact. Crocker got the disk. He put it on  
19 his e-mail, and he destroyed his copy. And he sent it to his  
20 lawyer, and his lawyer completed the loop by giving it back to  
21 STC. That was fact Number 5.

22 Fact Number 6 was that LeapFrog Development worked  
23 on this hard for 18 months. 18 months' time. Robert  
24 Campbell, a guy who doesn't have any incentive to lie, says  
25 18 months working more than full-time. And, of course, by the

1 way, I wrote the incremental tracking driver. I had to take a  
2 class to do it. It was hard work, but I did it. And he says,  
3 naturally we used the Volsnap from Microsoft. It's free.  
4 It's reliable. I didn't have to write it. There's no dispute  
5 about that. Even STC admits that for every version of AIP  
6 going except for the one that works on Windows 2000 uses the  
7 Volsnap by Microsoft.

8 Finally, I said they're not going to show actual  
9 damages. They're not going to show loss sales. They're not  
10 going to show any harm. And you saw the financials. I can't  
11 go into detail because Mr. Kirby is here. But you saw them.  
12 You know why they can't do that. So instead they hire a guy  
13 to go out and to a hypothetical reasonable analysis and come  
14 up with 4.2 for a reasonable license fee, 4.2 million. And  
15 I'm going to get into more detail in a minute. But that  
16 testimony is just not credible, and his methodology is not,  
17 either.

18 And I'll pull the testimony out from Russ Shreeve a  
19 little bit where, STC's COO, he testified clearly, you've got  
20 to know how it's going to be used if you're going to negotiate  
21 a license agreement. It only makes sense. Hey, I want to  
22 license your software. Great. How are you going to use it?  
23 It's the first question you ask.

24 Mr. Kilbourne didn't care. That wasn't part of his  
25 concern. His concern was developing some hypothetical number

1 that would be very, very large and hope that you guys found it  
2 persuasive.

3 Now, those were the seven facts that we talked  
4 about up front. And I want to talk about the law a little  
5 bit. The first two claims are the breach of contract claim --  
6 or I think it's, excuse me -- it's the breach of contract  
7 claim and the copyright claim. Now both of those claims as  
8 far as liability had been established, damages are not.  
9 That's your job. And the reason liability is established on  
10 those claims is because there's no intent in those claims. It  
11 doesn't matter if you intended to copyright something that you  
12 shouldn't have. It doesn't matter if you meant to. It  
13 doesn't matter if you didn't mean to. All that matters is you  
14 did.

15 And that's -- and that's really where you come in.  
16 The owner of the copyright has the opportunity to prove actual  
17 damages. Hey, I can show they've sold \$1 million using my  
18 copyright. They took my novel. I had a copyright on it, and  
19 they sold it. I was going to say it might be similar to the  
20 stuff with Naptser and the music back about ten years ago, but  
21 I'm not really sure. But that's the idea. You can show  
22 actual damages.

23 STC doesn't try to do that, and again, we know why.  
24 STC has elected to recover what's called statutory damages.  
25 And the Judge explained that to you in a jury instruction and

1 in pretty good detail.

2 Now, this is actually one part of the law that  
3 really made sense. You have -- under statutory damages the  
4 jury gets to decide a broad range, \$750 up to 30,000. And if  
5 they think it was with some kind of intent to hurt or wrongful  
6 or reckless disregard, then you can go up to \$150,000. But  
7 the standard statutory damages analysis is 750 to 30,000. And  
8 that makes sense. It was a copy was made, and the law says  
9 you can't do that. And the law says you get to evaluate the  
10 factors relating to how that copy was made, and it should fall  
11 somewhere between this. If you think, you know, gee whiz, he  
12 made a mistake, but, you know, no one's perfect and people  
13 make mistakes, then it ought to fall closer to the \$750 scale.  
14 If you think, well, Mr. Kirby should have spent more time  
15 going through that but I don't think it's in bad faith, then  
16 it's higher. But that's the law on copyright, and it makes  
17 sense.

18 Here the award should be on the low side.  
19 Mr. Kirby didn't know he was violating the copyright. He  
20 didn't have any idea the source code was on there, and he  
21 certainly wasn't trying to violate STC's copyright. But he  
22 did. And you're going to have to decide on that \$750 scale up  
23 to 30,000 what he has to pay for doing that.

24 Now, STC's second claim is for breach of contract.  
25 And again, like copyright, there's no intent there. You don't

1 need to mean to breach a contract. You just do. Even if you  
2 try not to breach a contract and you breach it, it's breached.  
3 Even if you don't know you're breaching the contract, it's  
4 breached. So there's no intent there, which is why the  
5 Court's already established liability. It's established, but  
6 damages is in your hands.

7 The Court instructed you on damages for breach of  
8 contract. The idea is that the parties are supposed to  
9 recover actual losses that they suffered. Here there has been  
10 none. Mr. Karrenberg is going to make an argument that it  
11 should be a reasonable license fee, but the jury instructions  
12 don't say that. The reasonable license fee comes into play on  
13 STC's third and final claim of trade secret.

14 The Judge did tell you that in regard to breach of  
15 contract, you do have the option to award what the law  
16 recognizes. It's called nominal damages. And nominal damages  
17 is what we're talking about theoretically here, I mean, and  
18 what I was talking about. Breaches of contracts happen, and  
19 sometimes the party that is bearing the breach doesn't lose a  
20 sale. It doesn't lose money. There's no actual harm. So in  
21 that case, the law says, and the Judge instructed you on this,  
22 you can award nominal damages. It can be as low as \$1. It  
23 can be a little more. But the idea is there was a breach, but  
24 there was no real damages. And as the Judge told you, damages  
25 have to be proven with some sort of particularity, some sort

1 of specificity. They can't be guesses. They can't be  
2 speculation. And there's no -- STC didn't even try to put in  
3 damages here on their breach of contract claim.

4 Which gets me to the remaining claim, the trade  
5 secret claim. And unlike the first two claims, the trade  
6 secret claim has not been established. And the reason it  
7 doesn't -- excuse me -- the reason it hasn't been established  
8 is because it requires intent. It requires an actual intent  
9 that I'm going to take this guy's trade secret, and I'm going  
10 to use it against him. And that's what you have to decide if  
11 there was an intent.

12 The evidence demonstrates why there is no intent  
13 here. Mr. Thomas Shreeve, the elderly, the father of Russ  
14 Shreeve and the CEO of the company stated under oath in  
15 deposition and to you that he never considered NetJapan to be  
16 his partner. Now, he went through document after document  
17 after document demonstrating that wasn't the case. 2004,  
18 2005, STC considered NetJapan part of the team. And it only  
19 makes sense. They were the only ones that put in money. They  
20 owned 41 percent. STC was worried about getting sued by a  
21 competitor. They wanted money from NetJapan to fund the suit.  
22 These guys worked closely together. That's why on top of  
23 those letters that Mr. Shreeve would send NetJapan, it would  
24 say, highly confidential. That's why he would share their  
25 attorney-client information with NetJapan. That's why he gave

1       them STC's product information prior to investment. That's  
2       why he gave them their business plan. That's why they gave it  
3       the financial information. And again, it's not surprising.  
4       They were in this together.

5               Now, I'm not arguing that to mean what I think  
6       Mr. Shreeve thinks I was arguing. I'm not saying because  
7       they're partners NetJapan ought to get access to the source  
8       code. There is evidence that they did have access to source  
9       code, and there's also testimony from STC that they didn't.  
10      That's not my argument. But my point is that's the atmosphere  
11      that existed in 2004 and 2005. So they weren't -- STC and  
12      NetJapan were adversaries when NetJapan asked Mr. Crocker to  
13      call on Mr. Kirby. They were in the same company together.  
14      They were trying to, you know, develop a product and make  
15      money together.

16             Now, had a dispute arisen between NetJapan and STC  
17      by the time Mr. Crocker came around? Yeah, it had. But it  
18      wasn't to the extent that it's grown later in 2007, 2008,  
19      2009. When Mr. Crocker showed up, he was a fellow who  
20      represented NetJapan. Mr. Kirby knew that. Mr. Kirby knew  
21      that NetJapan owned 41 percent. Mr. Kirby knew all the  
22      confidential information had been shared with NetJapan before.  
23      So when Mr. Crocker asked for certain information, he didn't  
24      think about it.

25             Now, that doesn't mean that Kirby should have

1 burned that disk. You know, maybe he should have been more  
2 careful. But it certainly doesn't show an intent that, oh, I  
3 know NetJapan is out to get StorageCraft and to take away  
4 their source code. Just like Mr. Crocker said over and over  
5 again, he was just trying to learn more about STC's  
6 investment, and that's it.

7 Now, the evidence is also pretty clear, and again  
8 Mr. Karrenberg didn't talk a bunch about this, about the use.  
9 I mean, there's two parts to this trade secret. That's what  
10 we're here about. That's what this trade secret claim is  
11 about. It's about the Snapshot driver, and it's about the  
12 incremental sector tracking. The snapshot driver,  
13 Mr. Barnes, STC's chief technology officer, says, oh, yeah.  
14 There's four or five competitors that have that. And he  
15 listed those off for us. He said, oh, yeah, Microsoft  
16 developed the Volsnap, and lots of people use that.

17 There's absolutely no evidence at all that the  
18 NetJapan product uses the VSnap Snapshot driver whatsoever.  
19 Instead, you have speculation that maybe going back to a  
20 version of Windows dated 2000, well, Volsnap doesn't exist for  
21 that, but that's all we know. There's no evidence anywhere.

22 The same is true for incremental sector tracking.  
23 The only testimony we have heard on that, we heard two  
24 testimonies. Mr. Campbell says, I wrote it all, and Mr. Kirby  
25 saying, I didn't have much of anything to do with it. And we

1 heard the chief technology officer saying, oh, yeah, three or  
2 four competitors have it. It's not just us with the  
3 incremental sector tracking.

4 And then, of course, the patent from IBM comes out.  
5 So this is knowledge that no one had but STC, and it was only  
6 contained in those boxes. It was out there. It was known.  
7 Of course Mr. Campbell figured out how to do it. He's been in  
8 the industry 25, 30 years. There's no reason to believe he  
9 didn't.

10 There's also no evidence that Jamey Kirby was  
11 involved in either of the Snapshot driver or the incremental  
12 sector tracking for the NetJapan products. But at some levels  
13 that missed the point because while there's no evidence he  
14 was, he could be. He's allowed to use his brain. He's  
15 allowed to use his skills. He's not allowed to use the VSnap  
16 code, but he can use everything else.

17 And I think the testimony is pretty clear from  
18 everything you heard about Mr. Kirby is he has ideas. He has  
19 thoughts. He knows how to write code. So there's no evidence  
20 that he was involved with the NetJapan product in regard to  
21 the issues of this case. But even if he was, he's allowed to  
22 be so. He 's not restrained.

23 Now, we talked a little bit about a reasonable  
24 royalty that Mr. Kilbourne has offered you, the \$4.2 million.  
25 And he tells you what he's trying to figure out is, well, if

1 two people sat down and negotiated that, what would they, what  
2 would they come to? And he tells you that even though he  
3 says, I didn't analyze how Kirby used it other than giving it  
4 to Mr. Crocker, I don't know if he uses it in a program, I  
5 don't know if he used it for a doorstop, I don't know if he  
6 used it to keep his fire going, it doesn't matter to him.

7 But that makes absolutely no sense. If you're  
8 going to negotiate a license agreement, the first thing you're  
9 going to ask is, okay, you want my software. How are you  
10 going to use it? And if the person says, well, I want to use  
11 it for something really small, you don't charge very much.  
12 You certainly don't charge \$4.2 million. If someone says I  
13 want to use it for everything in the whole world, maybe you  
14 charge more. But Mr. Kilbourne didn't consider any of that.  
15 He just said, well, it's valuable software, and therefore,  
16 it's \$4.2 million.

17 And Mr. Shreeve, Jeff Shreeve, we had a chance to  
18 talk to him a little bit on direct or on cross about how you  
19 use affects this licensing negotiation. And I asked him, so  
20 when you negotiated this license agreement with VMware, you  
21 knew what VM wanted to use it for.

22 We did, he answered.

23 They had a specific use in mind; correct?

24 They did.

25 And that affected the price and the scope of the

1 license, didn't it?

2 That's correct.

3 You would just assume naturally that makes sense;  
4 right?

5 Well, this is what we bargained for; right?

6 Correct. At different scopes we're bargaining for  
7 something else.

8 And I asked him on the next page:

9 But my question is just a little different. The  
10 price and the terms were dictated by how VMware wanted to use  
11 your software; right?

12 He answered: How they were using it, what  
13 ultimately ended up, correct, was how we came to a meeting of  
14 the minds. There is no doubt about it.

15 Mr. Kilbourne's analysis was flawed for many other  
16 reasons including the fact that he thinks that STC paid  
17 \$2.5 million to develop the code, or he's changed from that  
18 position so it would have taken a hypothetical company  
19 \$2.5 million, when in reality everyone knows the Russian  
20 engineers were a lot cheaper and it didn't cost near that  
21 much, not to mention that STC back when Mr. Kirby was in  
22 charge didn't have \$2.5 million to spend on anything.

23 In the end, the evidence set forth by STC is it's  
24 based on speculations. It's based on guesses. It's not based  
25 on hard evidence that Mr. Kirby knew he had that information

1 on his disk. It's not based on hard evidence that any of that  
2 source code has ever made its way into any product, especially  
3 NetJapan's product. It's just speculation. It's just guess  
4 work. It's just assumption.

5 The law is clear that the burden is on STC to prove  
6 that a trade secret was stolen, that it was used and that STC  
7 was damaged. STC must share that by a preponderance of the  
8 evidence.

9 MR. KARRENBURG: Excuse me -- you're right.  
10 Clearly. I'm sorry.

11 MR. ENSOR: That's as well as we can go.

12 You know, I would close by saying I think the real  
13 issue here is STC wishes that Jamey Kirby couldn't compete in  
14 the backup software industry. And I think STC is worried that  
15 maybe Jamey Kirby will do something brilliant again. They've  
16 been riding off his ideas for the last 10 years doing very  
17 well at it. And having him out there not in the drink  
18 business anymore as much, more in the backup industry concerns  
19 them.

20 But that's not how the free market works.  
21 Mr. Kirby never signed a noncompete. Everybody knows that.  
22 It's been almost eight years since he left StorageCraft. He's  
23 allowed to go out in the market and compete. He's allowed to  
24 develop new software, and the market will be better for it if  
25 he does something brilliant again, notwithstanding STC's

1 speculations and guesses.

2 Mr. Kirby made a mistake, and he's paid for that  
3 mistake already, and he's going to pay for it through the  
4 copyright claim based on the damages number that you guys come  
5 up with. That is enough. The idea behind damages in the law  
6 is that you compensate someone for their loss. That's the  
7 concept. You're not giving someone a windfall. You're not  
8 penalizing someone. You compensate them for their loss.

9 The Judge told you that you are the seekers of the  
10 truth, and that's right. And when you go and find the truth  
11 on these three claims, I think you'll see that the 75 --  
12 excuse me -- for the copyright claim the \$750 to \$30,000 range  
13 is more than appropriate, and I argue it should be on the low  
14 side. The breach of contract damages haven't been proved  
15 whatsoever, and that Mr. Kirby never stole the trade secret.  
16 And even if he accidentally had a trade secret, never using it  
17 shouldn't be justification to impose a \$4.2 million judgment.  
18 Thank you.

19 THE COURT: Mr. Karrenberg, your final summation?

20 MR. KARRENBURG: Thank you, Your Honor. On all  
21 calculations I have about nine minutes since I stopped the  
22 other one early.

23 Let me go to the extent to show you exactly the  
24 extent of what they'll do to try to get out of this. You  
25 heard counsel say intent for the misappropriation. You just

1 read every jury instruction, you heard Judge Nuffer read every  
2 jury instruction. I want you to go in there, and I want you  
3 to find the word intent under any instruction this Court has  
4 given you for actual liability or misappropriation. It's not  
5 there. Making up the law. Thank God we have it.

6 And here it is. Instruction Number 30. I believe  
7 it's 30. Misappropriation means acquisition of a trade secret  
8 by a person who knows or has reason to know that a trade  
9 secret was acquired by improper means. Disclosure or use of a  
10 trade secret of another without the express or implied consent  
11 by a person.

12 You didn't hear the word disclosure talked about by  
13 counsel, either. And then the instruction goes on and tells  
14 you what improper means is.

15 At the time of disclosure or use, the  
16 misappropriator knew or had reason to know that its knowledge  
17 of the trade secret was derived through a person who utilized  
18 improper means to acquire it.

19 We had a contract that says it's not going to  
20 happen.

21 Acquired under circumstances giving rise to a duty  
22 to maintain its secrecy or limit its use.

23 What else do we do but to get him to sign a  
24 contract that says he's not going to do it?

25 Derive from or through a person who owed a duty to

1 plaintiff to maintain its secrecy.

2 The duty is set forth in a document he signed on  
3 the advice of some of the best lawyers in this town. And  
4 that's misappropriation. It doesn't say someone who intended  
5 to deprive you of it. This is what the law is.

6 And they also don't like the law that we're  
7 entitled to. And that is, oh, a hypothetical reasonable  
8 royalty. Well, look at instruction Number 32.

9 Damages from misappropriation of a trade secret may  
10 be measured by imposition of liability for a reasonable  
11 loyalty for a misappropriator's authorized disclosure or use  
12 of a trade secret.

13 So when Mr. Kilbourne gave you the reasonable  
14 royalty, that's exactly what the law allows you to do, and  
15 we're being criticized for following the law and by someone  
16 who clearly did not.

17 And he says, well, you've got to go, just look at  
18 Russ Shreeve's testimony about the VM license. If you  
19 remember, the VM license, the reason the use went down, the  
20 price went down. Of course, it was restricted. It was  
21 restricted. It was restricted. It was restricted more and  
22 more. It had to be bundled. It didn't have the source code.  
23 It didn't have a sector tracking technology. It had to be  
24 restricted. So, yeah, when we have enforcement that's  
25 restricted, you can get a cheaper price.

1 But what did Mr. Kirby have? He had unrestricted  
2 use of this because he wasn't supposed to have it in the first  
3 place. And as Mr. Kilbourne said, in reality that was the  
4 value of the entire business.

5 And on to other things. Oh, well, you shouldn't  
6 have been upset giving it to Crocker. He knew that they were  
7 really partners getting along. It wasn't to show them they  
8 were entitled to it, but to show really, you know, it was okay  
9 to give him that stuff. This is the guy who recommended his  
10 lawyers to go be hired to go sue them. Yeah, he really  
11 understood that he knew we were getting along. Let me tell  
12 you. Clients don't like each other who are suing each other.  
13 It's not the nature of the beast, all right? It's not a very  
14 hard concept at all.

15 And willful and malicious on all of these claims  
16 for the increased statutory damages, which by the way again is  
17 our statutory right. We are allowed to do that, and we do  
18 that because we've got the other damages covered under the  
19 trade secret law. So being criticized again for following the  
20 law of the United States. But both of those, willful and  
21 malicious, include being reckless.

22 And just like counsel said, there were thousands of  
23 e-mails with this stuff on it, and he had warranted to us he  
24 had gotten rid of them. And it's reckless not to check all of  
25 these when you know time and time again that's what you're

1 sending. And it's not just 11. There's 11 full sets of the  
2 VSnap source code on there. And that's the core value of my  
3 client's business.

4 And again, we don't have any other remedy. This is  
5 our only remedy under the American system. We can bring a  
6 lawsuit. We can allege and prove that he breached this  
7 contract, infringed our copyright, misappropriated our trade  
8 secret. And then what the law allows us for those is the  
9 statutory damages for copyright, the reasonable royalty from  
10 the trade secret, which is also the damages for the contract.  
11 Why? Because if he wanted to buy it, that's the minimum he  
12 would have paid to get it. And he warranted to us he wasn't  
13 going to get it.

14 Thank you, ladies and gentlemen. I really again  
15 appreciate you.

16 THE COURT: Ladies and gentlemen of the jury, I  
17 will be delivering to you the official set of the instructions  
18 and the verdict form. Counsel and I are going to confer about  
19 the exhibits which have actually been received, and they will  
20 be delivered to you a little bit later in the juryroom. But  
21 we'll deliver these things to you now.

22 The court security officer will now take an oath to  
23 take you to the juryroom for deliberation.

24 (Whereupon, the court security officer is sworn.)

25 COURT SECURITY OFFICER: I do.

1 THE CLERK: Thank you.

2 THE COURT: Could I give you this book and verdict  
3 to take with you to the juryroom?

4 COURT SECURITY OFFICER: Oh, sure.

5 THE COURT: Thank you. All rise.

6 (Whereupon, the jury left the court proceedings.)

7 THE COURT: All right. Please be seated. We need  
8 just a minute I think to work out the issues with the  
9 exhibits. We don't need to do this on the record, so I'm  
10 going to ask the clerk to step down and go over her list with  
11 you.

12 MR. KARRENBURG: We need to add these things in.

13 MS. SNEDDON: We need to add those in, too.

14 THE COURT: Right. But we'll bring another cart  
15 around to get those. But there's discrepancies to cover with  
16 you, but we don't need this on the record. So we're off the  
17 record until we go back on to confirm the exhibit list in just  
18 a moment. I'll bring the other cart. We're in recess.

19 (Recess.)

20 THE COURT: Before we move to the next sentencing,  
21 I'd like counsel from STC to come forward and make a brief  
22 record. We're on the record again in StorageCraft vs. Kirby.

23 Counsel, have you reviewed the exhibit list that we  
24 purged the un-admitted exhibits?

25 MS. SNEDDON: Yes, Your Honor.

1 MR. ENSOR: Yes, Your Honor.

2 THE COURT: Did you approve it for delivery to the  
3 jury?

4 MS. SNEDDON: Yes, Your Honor.

5 MR. ENSOR: Yes, Your Honor.

6 THE COURT: We find it helps them in these cases  
7 with lots of exhibits.

8 Did you approve the exhibits as compiled for  
9 delivery to the jury making sure that no un-admitted exhibits  
10 are included there?

11 MS. SNEDDON: Yes.

12 MR. ENSOR: Yes, Your Honor.

13 THE COURT: All right. Then we'll wheel the two  
14 carts of exhibits into the jury.

15 MS. SNEDDON: Thank you, Your Honor.

16 THE COURT: I received our first note from the  
17 jury. They inform me that they have selected Kathleen  
18 Nielson, juror Number 1, as their foreperson, and also say  
19 that they would like us to order dinner. So we intend to do  
20 that, and we'll deliver these lists.

21 Anything else we should cover in this case?

22 MR. KARRENBURG: No, Your Honor.

23 MS. SNEDDON: No, Your Honor.

24 MR. ENSOR: No, Your Honor.

25 MR. KARRENBURG: We left our phone numbers with the

1 clerk.

2 THE COURT: If you both have phone numbers, stay  
3 close.

4 MR. KARRENBURG: We're just across the street, and  
5 we'll be here in five minutes.

6 THE COURT: Okay. That's great. Last week's jury  
7 had four questions before we got done.

8 All right.

9 MR. KARRENBURG: Thank you, Judge. We'll get  
10 everything cleaned up tomorrow morning. Do you have anything  
11 scheduled in the morning?

12 THE COURT: No. We have no morning. We do have a  
13 10 o'clock.

14 MS. SNEDDON: We'll be out of here before that.

15 MR. KARRENBURG: And we'll get it out of your hair.  
16 We'll get everything out.

17 MR. ENSOR: Judge, my paralegal is on his way down  
18 to clean up, so maybe once you get done with your sentencing.

19 THE COURT: That would be fine.

20 MR. ENSOR: Thank you.

21 THE COURT: Only one person to carry those big  
22 boards?

23 MR. ENSOR: I assume they'll call on me and ask for  
24 help.

25 THE COURT: Okay. I think by 5:15 this room will

1 be available.

2 MR. ENSOR: Thank you, Your Honor.

3 (Recess.)

4 THE COURT: The court security officer is bringing  
5 the jury down.

6 (Whereupon, the jury returned to the court  
7 proceedings.)

8 THE COURT: We're back in the courtroom in  
9 StorageCraft vs. Kirby convened with the jury and with  
10 counsel.

11 Who has been elected as foreperson of the jury?

12 Thank you. Has the jury reached a unanimous  
13 verdict?

14 JUROR NUMBER 1: Yes.

15 THE COURT: I'll ask the clerk to retrieve the  
16 verdict and deliver it to me. While she's doing that, I want  
17 to ask, is there any member of the jury who believes that this  
18 verdict is not unanimous? If so raise your hand.

19 Thank you. I'll now examine the verdict for form.

20 The verdict appears to be in proper form. I'll now  
21 read the verdict. This is publishing the verdict.

22 StorageCraft Technology Corporation vs. James  
23 Kirby.

24 We, the jury, in the above entitled action  
25 unanimously find as follows:

1                   Question Number 1. The Court has previously  
2                   determined that James Kirby is liable to STC for breaching the  
3                   parties' 2005 settlement agreement. What amount of damages,  
4                   if any, was caused by Kirby's breach of contract?

5                   \$2.92 million.

6                   Question Number 2. The Court has previously  
7                   determined that James Kirby is liable to STC for having  
8                   infringed STC's copyright in the VSnap source code. Did STC  
9                   prove by clear and convincing evidence that Kirby's copyright  
10                  infringement was willful?

11                  Answer: Yes.

12                  Question Number 3. What amount of statutory  
13                  damages is STC entitled to receive for Kirby's copyright  
14                  infringement?

15                  \$100,000.

16                  Question Number 4. Did Kirby misappropriate a  
17                  trade secret of STC?

18                  Answer. Yes.

19                  Question Number 5. What amount of damages, if any,  
20                  is STC entitled to recover as a result of Kirby's  
21                  misappropriation of SCT's trade secret?

22                  \$2.92 million.

23                  Question Number 6. Did STC prove by clear and  
24                  convincing evidence that Kirby's misappropriation of STC's  
25                  trade secret was willful and malicious?

1 Answer. Yes.

2 The verdict is signed and dated by the jury  
3 foreperson Kathleen Nielson.

4 I will now poll the jury. This is my practice in  
5 every case.

6 Juror Number 1, is this your verdict?

7 JUROR NUMBER 1: Yes.

8 THE COURT: Jury Number 2, is this your verdict?

9 JUROR NUMBER 2: Yes, it is.

10 THE COURT: Jury Number 3, is this your verdict?

11 JUROR NUMBER 3: Yes.

12 THE COURT: Juror Number 4, is this your verdict?

13 JUROR NUMBER 4: Yes.

14 THE COURT: Juror Number 5, is this your verdict?

15 JUROR NUMBER 5: Yes.

16 THE COURT: Juror Number 6, is this your verdict?

17 JUROR NUMBER 6: Yes, sir.

18 THE COURT: Juror Number 7, is this your verdict?

19 JUROR NUMBER 7: Yes. Yes, sir.

20 THE COURT: Juror Number 8, is this your verdict?

21 JUROR NUMBER 8: Yes.

22 THE COURT: Juror Number 9, is this your verdict?

23 JUROR NUMBER 9: Yes.

24 THE COURT: Juror Number 10, is this your verdict?

25 JUROR NUMBER 10: Yes.

1 THE COURT: Juror Number 11, is this your verdict?

2 JUROR NUMBER 11: Yes.

3 THE COURT: Juror Number 12, is this your verdict?

4 JUROR NUMBER 12: Yes.

5 THE COURT: Do counsel believe that any further  
6 proceedings are required before we excuse the jury?

7 MR. KARRENBURG: No, sir.

8 MR. ENSOR: No, Your Honor.

9 THE COURT: Then let me say on behalf of everyone  
10 in this courtroom and persons interested in this case not in  
11 this courtroom how much we appreciate your service. You've  
12 been diligent, you've been attentive, and you have really  
13 fulfilled your oath as jurors. Our country is unique in the  
14 world entrusting the most important decisions in the judicial  
15 system to ordinary citizens. You have helped us keep the  
16 faith of that system, and we appreciate very much your  
17 service.

18 Please remember, there is evidence you have heard  
19 which you are bound by your oath as jurors to maintain secret  
20 and not disclose. You may if you wish speak to persons about  
21 other aspects of the case, but you are not required to speak  
22 to anyone or answer anyone's questions about the case. If you  
23 have questions about that, you can contact the jury office  
24 that you contacted with regard to your earlier service.

25 Thank you very much for your service. All rise for

1 the jury. The jury will now be excused from the courtroom.

2 (Whereupon, the jury left the court proceedings.)

3 THE COURT: Please be seated.

4 Are there any further issue for us to handle this  
5 evening?

6 MR. KARRENBURG: No, Your Honor. We'll pick up the  
7 rest of our stuff in the morning. We've already made  
8 arrangements for that. My tooth fell out tonight on a  
9 crouton, so I at least got through that.

10 On the record, I would like to thank Mr. Ensor who  
11 was a tremendous opponent on the merits, but on the procedural  
12 things he behaved exactly what I hoped every lawyer in my firm  
13 would behave correctly. And I mean that sincerely.

14 MR. ENSOR: Thank you, Tom.

15 MR. KARRENBURG: You're welcome.

16 THE COURT: And let me tell you both, counsel, it  
17 was a well-tryed case. It's been a pleasure for us to work  
18 with you this week. You've both done excellent work, and I  
19 think the presentation for the benefit of the jury was just as  
20 it should be, very clear and very professional all the way  
21 through. So it's been a pleasure to try the case with you.

22 That said, I don't want to see you again for a  
23 while because we spent plenty of time together. But it really  
24 has been a pleasure to work with all of you in this case.  
25 Thank you very, very much for your excellent work.

1 MR. KARRENBURG: Thank you, Your Honor.

2 MR. ENSOR: Thank you, Your Honor.

3 MR. KARRENBURG: I appreciate the courtesies from  
4 the court staff.

5 MS. SNEDDON: Thank you, Your Honor.

6 THE COURT: Thank you. We're in recess.

7 (Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH )

2 ) ss.

3 COUNTY OF SALT LAKE )

4 I, KELLY BROWN HICKEN, do hereby certify that I am  
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on August 9, 2012, and thereat reported  
8 in Stenotype all of the testimony and proceedings had, and  
9 caused said notes to be transcribed into typewriting; and the  
10 foregoing pages number from 177 through 290 constitute a full,  
11 true and correct report of the same.

12 That I am not of kin to any of the parties and have  
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this \_\_\_\_ day of  
15 \_\_\_\_\_ 2012.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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